Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

DONALD R. KURZ, et al.

Petitioners,

v.

THE PHILADELPHIA ELECTRIC COMPANY, et al.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Ronald L. Wolf, Esquire*
Martina W. McLaughlin, Esquire
LITVIN, BLUMBERG, MATUSOW & YOUNG
The Widener Building, 18th Floor
1339 Chestnut Street
Philadelphia, PA 19107
(215) 557-3300
Counsel for Petitioners
**Counsel of Record*

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QUESTIONS PRESENTED

Under ERISA, when does a plan administrator/fiduciary who is also the employer have a fiduciary duty to truthfully tell plan participants that a change to the pension plan is under consideration?

Under ERISA, does the six-year statute of limitations for a breach of fiduciary duties set forth in 29 U.S.C. §1113 apply when the breach of duty involves fraud or concealment?

PARTIES TO THE PROCEEDING

The Petitioners are the class members who consist of former employees of PECo who retired from January through and including June 1987 under the PECo Annuity Service Plan effective January 1, 1987. [Appendix at 64a]. This class includes the following named plaintiffs: Donald R. Kurz, William W. Anderson, James Beck, William T. Bergen, Charles W. Bowden, William H. Brown, Richard Cahill, Armando L. Capoferri, Robert C. DeMarco, James J. DiLolle, Sr., Vincent J. DiMaggio, John J. DiValentino, Jr., William E. Drumel, Victor J. Gibialante, Francis T. Golden, James J. Granger, Elmer D. Greim, Jr., James H. Hair, John M. Hoopes, Benjamin J. Kilian, George c. Linthicum, Hubert A. McKown, Jr., Henry P. McNamee, Oliver K. Messner, Robert E. Miller, John A. Morse, Samuel J. Mullen, John A. Munley, Stanley B. Myers, John J. Nusspickel, James W. Patterson, Alfred B. Schumann, Joseph C. Sharkey, William H. Smoyer, Woodrow E. Snyder, James D. Sutliff, Edward J. Vetner, Dominic C. Viglianese, G. Earle Watt, Frederick W. Winterling, and John R. Young.

The Respondents are Philadelphia Electric Company, Service Annuity Plan of Philadelphia Electric Company, Charles L. Fritz, J.L. Everett, III, and John H. Austin, Jr.

RULE 29.6 STATEMENT

There are no affiliates or subsidiaries of Philadelphia Electric Company other than wholly-owned subsidiaries to petitioners' knowledge.

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OPINIONS BELOW

The most recent opinion of the Court of Appeals in this case is reported at 96 F.3d 1544 (3d Cir. 1996) [Appendix at 1a-22a]. The most recent opinions of the District Court in this case (Appendix at 47a-77a) are not reported.[1] The denial of a Writ of Certiorari by the United States Supreme Court in this case is reported at 510 U.S. 1020, 114 S. Ct. 622 (1993) [Appendix at 78a]. The first opinion of the Court of Appeals is reported at 994 F.2d 136 (3d Cir. 1993) [Appendix at 91a-98a]. The previous opinion of the District Court in this case (Appendix at 99a-141) is not reported. The Third Circuit Court of Appeals' opinion denying a petition for rehearing following the first decision by the Court (Appendix at 142a-143a) is not reported. The Third Circuit Court of Appeals' opinion denying the petition for rehearing on behalf of class members Frank Monzo, Martin Morgan and Gloria McEntee following the second decision by the Court (Appendix at 144a-146a) is not reported.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on October 1, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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[1] In the District Court, the Kurz case was consolidated with the case of Fischer v. Philadelphia Electric Co., because the legal issues involved were virtually identical. The Court of Appeals also reversed the decision in favor of the Fischer class members based in part upon the same legal issues presented in this Petition for Writ of Certiorari. The Fischer class members filed a Petition for Writ of Certiorari with the United States Supreme Court on December 24, 1996, which was denied. In the event that the Court grants Certiorari in this case, it is requested that the Court reconsider its decision in Fischer and grant Certiorari in that case as well given the common identity of legal issues involved.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of ERISA are 29 U.S.C. §1104(a), 1113 and 1132(a) and (e). They are reproduced in the Appendix. [Appendix at 147a-148a].

STATEMENT OF THE CASE

This petition involves the claim that PECo violated a fiduciary duty under ERISA owed to former employees who participated in the company's pension plan prior to their retirement. The petitioners alleged and, with respect to some of the class members' claims, the District Court agreed, that PECo misled them about its "serious consideration" of a possible change to the pension plan formula which would have increased their retirement benefits. The Third Circuit Court of Appeals reversed the decision of the District Court finding that PECo was not seriously considering a change to the pension plan under a new three-prong test which the court imposed. The specific issue presented in this petition is when under ERISA does a fiduciary duty arise on the part of a plan administrator who is also an employer to truthfully tell plan participants that it is considering a possible change to the pension plan. The second issue presented in this petition concerns whether the six-year statute of limitations for breach of fiduciary duty in cases involving fraud or concealment applies to cases where the breach itself involves fraud or concealment.

A. Factual Background

On July 2, 1987, PECo issued an official bulletin to their employees announcing an improved minimum formula for the calculation of pension benefits to be effective August 1, 1987. The petitioners had retired from January 1 through June 1, 1987 and, therefore, were denied eligibility for these enhanced benefits. The pension benefits they received were calculated under the old formula which was long recognized by PECo as being lower than average for the utility industry.

Initial discussions regarding amendment of the pension plan began at least two years before its official adoption. Significantly,

by the time respondents were making their retirement decisions, PECo had already anticipated the need to make improvements to the pension plan and, in fact, had set a target date by which to accomplish this goal. PECo, however, made a conscious decision not to disclose this information to prospective retirees before the official announcement of the amendment on July 2, 1987. As a result, the respondents were falsely told that there were no plans to amend the pension plan in response to questions posed to their retirement counselors and/or supervisors at a time when they were making important decisions about the timing of their retirement.

The extensive history of PECo's planning efforts in developing the amendment to the Service Annuity Plan proves that "serious consideration" was being given to a change in the Service Annuity Plan to enhance pension benefits since at least March 1, 1987.[2]

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[2] Petitioners submit that plans to change pension benefits were under serious consideration at an even earlier date but at the very least by March 1, 1987 -- the date on which the District Court determined serious consideration began. Indeed, petitioners strenuously argued in the Court below that the date should at least be February 27, 1987 when Frederick Beaver, the Administrative Assistant in the Benefits Division, contacted on outside consultant, TPF&C and, on behalf of PECo, requested cost calculations for a pension formula that represented a change to the pension plan. It was that same activity, contacting an outside consultant, which the District Court in the Fischer case held constituted "serious consideration." Even though it is only two days earlier, it is of utmost significance because under the District Court's ruling, those people whose retirement date became effective on March 1, 1987, were not entitled to recover. If the Court grants certiorari in this case, the Subclass B petitioners (those class members whose retirement was effective before March 1, 1987) ask the Court to consider their claim that plans to change the pension formula were under sufficient consideration to

(continued...)

From at least as early as 1977, on an annual or bi-annual basis, PECo participated in surveys that compared the employee pension benefits of companies in the utility industry. These surveys assessed and ranked the utility company's respective pension benefits. For many years, the survey was performed by the Public Service Electric and Gas Company and was utilized "to look to see whether or not any changes in the future should be made." Frederick Beaver, an administrative assistant in Personnel and Industrial Relations Department, was one of the employees that would review the comparative studies performed by PSE&G.

Previously, PECo had amended its pension formula to increase benefits, effective as of January 1, 1982, after a survey by PSE&G indicated that PECo's pension benefits were low, compared to other companies in the industry. This is significant because in approximately 1983, PECo began to see some erosion in its positioning relative to other surveyed utilities with respect to pension benefits being offered. PECo's position was eroding basically as a result of other companies improving their plan formulas. As a result, over a period of years prior to 1987, there was a growing interest in adjusting the PECo plan formula to improve benefits. The events set forth below well documents this point.

In 1985, at the request of PECo's Finance Division, TPF&C, an outside actuarial consultant, performed an analysis for a long-term financial planning study, which included a projection of what PECo's pension obligations would be in the future. PECo provided information concerning its long-range "plan improvements" which were listed, along with the projected date on which the improvements would become effective, in the March 14, 1985 preliminary report prepared by TPF&C. One of the plan improvements identified for January 1, 1988 was to increase the integration percentage of the minimum formula to .35 from .30. This is an increase to the multiplier used to calculate the part B

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[2](...continued)

trigger PECo's duty to truthfully inform them of the plan before their retirement.

pension benefits. Significantly, this projected pension improvement identified in 1985 was part of the improvement which was adopted on August 1, 1987! As Mr. Fleisher from TPF&C acknowledged at trial, PECo merely moved up the implementation date of this plan improvement from January 1988 to August 1, 1987.

On October 2, 1985, the final version of the TPF&C pension funding study for the Service Annuity Plan was presented to PECo during which there was a discussion regarding potential changes that could be made to the pension plan. These discussions continued among PECo management personnel over the next couple of years. In October 1985, Michael Crommie, the Director of Employee Services Division, and Mr. Beaver had discussions regarding potential changes to the pension plan that could affect the level of benefits provided in order to increase PECo's position in comparison to other utility companies. In the 1985-1986 time frame, Mr. Beaver and Mr. Crommie also had discussions with Ronald Downs, the Manager of the Industrial Relations Department, regarding the competitive position of PECo's pension benefits and what alternatives might be available for improvement to the pension plan, including the possibility of modifying the service factors used in calculating pension benefits.

The activity aimed at improving the pension plan continued in 1986 when, after PSE&G had decided to discontinue the benefits survey, PECo assumed the task of compiling the survey. It was Mr. Crommie's intention to complete the survey by February 20, 1987 because, "from a benefit planning standpoint, it's always worthwhile to receive the information as early in the year as you possibly can get it... to give you as much time for planning for that particular year." Obviously, Mr. Crommie was anticipating the foreseeable likelihood that the survey would verify the need to improve the PECo pension plan given the past evidence of the erosion of the benefits plan in comparison with other surveyed utility companies. Indeed, as of June 1986, Mr. Crommie informed management of the continuing deterioration of the pension plan and stated that changes might be considered to alleviate that situation. Then, on June 23, 1986, Mr. Crommie sent a memorandum to Mr. Downs regarding the 1986 pension survey in which he asked

whether to anticipate a study to be conducted by TPF&C based upon the 1987 survey results. Mr. Downs responded:

> **"Probably not, but suggest we consider after we see survey results. Obviously, some input from TPF&C will be required with regard to our recommended modifications to plan!"**

This verifies that PECo already had recommended modifications to the pension plan as of June 1986.

Mr. Beaver authored the 1986 pension survey report which was issued May 22, 1987. In approximately February 1987, he received the data from the other utilities participating in the 1986 pension study. As a result of the survey, Mr. Beaver concluded that out of 23 comparison companies, PECo's position was below the mid-point and significantly below the mid-point for all management cases; PECo's position had become fairly non-competitive. Consequently, PECo increased its activity with regard to evaluation of alternatives to improve the pension plan. Mr. Beaver discussed with colleagues what PECo should do about the further deterioration of its pension benefits relative to other utility companies and, significantly, it was his thought that, based on the results of the pension survey data, it was appropriate to make an improvement to the pension plan in 1987. Consequently, on February 27, 1987, Mr. Beaver called Don Fleisher at TPF&C and asked questions concerning a possible pension plan change. Specifically, Mr. Beaver asked Mr. Fleisher to give him a cost for a pension formula that represented a change to the pension plan. Mr. Fritz, the Vice President of Personnel and Industrial Relations, was aware in February 1987 that TPF&C was working with PECo to evaluate such a formula change to the pension plan.

Thereafter, PECo undertook systematic activity to implement the pension plan change. This included the following activity:

- In March 1987 Don Fleischer of TPF&C began calculating benefit projections for senior PECo

officers which included a change to the pension plan.

- Through the month of April 1987 TPF&C worked on proposed changes to the plan.

- Don Fleischer of TPF&C outlined four proposals to PECo as early as April 2, 1987 and provided additional updated information on April 13 and April 20, 1987.

- At the April 24, 1987 meeting with the IGA, Mr. Fritz stated that this was a good year for changes to the pension plan since it was well funded and PECo's plan was below the industry norm.

- On May 6, 1987, Murdoch of TPF&C met with Mr. Crommie of PECo to discuss two competing alternatives for changing the plan.

- On May 11, 1987, Murdoch noted a conversation with Mr. Fritz regarding pressure from the IGA to improve the pension plan.

- On May 13, 1987, Mr. Fleischer of TPF&C noted a conversation with McGinley and Beaver of PECo that the company was being pressured by the IGA for improvements to the pension plan and that some commitment had already been made.

- On May 20, 1987, TPF&C prepared a discussion outline of PECo's retirement plan study commenting that PECo needed to improve its pension.

- In a May 20, 1987 outline, the employee services division of PECo concluded that the time for a pension change had arrived given PECo's deteriorating position vis a vis other utilities.

The extensive history of PECo's activities aimed at remaining competitive with other utilities by improving its pension plan clearly and convincingly documents that by March 1, 1987, **at the latest**, PECo was seriously considering such an option. The facts established of record in this case likewise document that PECo intentionally withheld information regarding its planning efforts from the petitioners. Indeed, the evidence of PECo's conduct was so iron clad that the District Court (in the first opinion) acknowledged that PECO had an actual policy of keeping potential changes to the pension plan confidential before being voted on by the Board of Directors. [Appendix at 132a-133a]. Petitioners presented glaring evidence of the nature and extent of the concealment of information by PECo. For example, defendant, Charles L. Fritz, PECO's Vice President of Personnel and Industrial Relations, claims that he thought it was important that potential retirees at least be told, in answer to questions regarding this matter, that the IGA (an employee organization) was in fact asking for improvements to the pension plan because:

> "I think it would be wrong for the interviewer to say that nothing was being discussed or looked into. I think it would have been dishonest, and we certainly try to be completely above board in this area." [Fritz Deposition, pps. 160-161].

Yet, in March, 1987, after he had specifically told the IGA that 1987 was the right time to make such a change to the pension plan, Mr. Fritz intentionally did not inform Mr. Crommie, supervisor of the retirement interviewers, of this fact, claiming that "he didn't need to know many of these things at that time...." [Fritz Deposition, p. 84].

B. The Proceedings Below

Despite the extensive evidence, as outlined above, the District Court, when initially considering the case, decided that there were no material misrepresentations made to petitioners because PECo had not given "serious consideration" to changing the pension plan until such plans were officially announced. The District Court granted summary judgment in favor of the

respondents. The petitioners appealed to the Court of Appeals which relied upon convincing factual evidence to conclude that the District Court's characterization of the record as lacking evidence of material misrepresentations by PECo was incorrect and therefore reversed and remanded the case for trial. In so deciding, the Court rejected PECo's explanation that since the company had never told the benefits counselors that it was considering changes to the pension plan, then the counselors' representations to the respondents, that no such plans were being contemplated, were truthful, holding, in the companion case of Fischer v. Philadelphia Electric Co., 994 F.2d 130, 135 (3d Cir. 1993) [Fischer I, Appendix at 88a]:

> "This explanation will not do, for the fiduciary obligations owed to the plan participants were owed by PECo as plan administrator. These obligations cannot be circumvented by building a chinese wall around those employees on whom plan participants reasonably rely for important information and guidance about retirement."

The Court of Appeals in the Fischer case also gave the District Court the following specific instructions to follow on remand when determining whether the contents of the particular communications PECo made to the petitioners constituted affirmative misrepresentations:

> "The content of the particular communications PECo allegedly made to members of the plaintiff class and whether such communications constituted affirmative misrepresentations are questions of fact properly left to the trier of fact on remand. Whether an affirmative misrepresentation was 'material', however, is a 'mixed question of law and fact.' In the present context, a misrepresentation is material if there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision about if and when to retire. Included within the overall materiality inquiry will be an

> inquiry into the seriousness with which a particular change to an employee pension plan is being considered at the time the misrepresentation is made. All else equal, the more seriously a plan change is being considered, the more likely a misrepresentation, e.g., that no change is under consideration, will pass the threshold of materiality." Id. [Fischer I, Appendix at 89a]. [Citations omitted].

Finally, in the first opinion issued by the Court of Appeals in the Kurz case, the Court specifically rejected the establishment of a bright-line rule for the determination of when serious consideration begins, noting that "tying serious consideration to a single objective event in the present context would work unfairly in some instances." Kurz v. Philadelphia Electric Co., 994 F.2d 136 (3d Cir. 1993) [Kurz I, Appendix at 97a].

The respondents filed a petition for rehearing and rehearing en banc to the Third Circuit Court of Appeals which was denied. [Appendix at 142a-143a]. Thereafter, the respondents filed a Petition for Writ of Certiorari with this Court which was also denied. [Appendix at 78a].

On remand, the main question which the District Court was required to decide was when PECo began to seriously consider a change to the pension plan formula. The District Court determined that serious consideration began on March 1, 1987 based upon the following conclusions.

> At that time, according to Mr. Fritz, PECo began considering not only improving the plan for journeyman level employees, but also higher management type positions. Fritz had met with IGA representatives and stated that the timing was right for making significant changes in the pension plan, and that the company was looking into several alternatives, including the IGA's proposal from the year before. Fritz represented that the change would be in the order of a ten percent increase.

> Also in March, 1987, Towers Perrin began calculating specific benefit projections for senior PECo officers.
>
> Also supporting this conclusion are the notes of Don Fleischer of Towers Perrin of May 13, 1987, in which he noted a conversation with John McGinley and Fred Beaver of PECo that the company was being pressured by the IGA for improvements to the pension plan and that "some commitment [had] already [been] made." These PECo executives, at least, believed the company had been seriously considering improving the pension formula for some time. [*Opinion in the Court, May 16, 1994, p. 23*, Appendix at 63a-64a].

The Court found that PECo, thereafter, undertook systematic activity to implement the pension plan change. [Id, *Conclusion of Law No. 13,* Appendix at 64a].

In addition, because the complaint in the Kurz case was not filed until approximately three and one-half years after the pension plan change was announced by PECo, the District Court was required to determine whether plaintiffs' claims for breach of fiduciary duty were timely under the statute of limitations imposed by ERISA under 29 U.S.C. §1113. The District Court concluded that because plaintiffs' complaint alleged concealment of the plan to implement the pension change and since PECo admitted that it had a policy of keeping such matters confidential and telling potential retirees that no such plans existed until formally announced, then the six-year statute of limitations for cases of concealment set forth in 29 U.S.C. §1113 was applicable. The Court also held that since the lawsuit was filed less than six years after the breach of fiduciary duty was discovered by the plaintiff class members, their claims were not barred by the applicable statute of limitations. [*Opinion of the District Court, May 16, 1994, Conclusions of Law Nos. 22-24,* Appendix at 65a].

The District Court then divided the class members into two subclasses: Subclass A consisting of all those members of the Kurz class who solicited information and retired after PECo's duty to inform retirees of the pending change arose on March 1, 1987; and Subclass B consisted of all other members of the Kurz class. [*Opinion of the District Court, May 16, 1994, Conclusion of Law No. 21, p. 25,* Appendix at 65a]. Thereafter, the Court held a separate hearing to determine the petitioners who constituted Subclass A of the damages to which they were entitled. In the damages phase of the trial, the District Court also clarified its prior opinion and held, on the basis of precedent from the Third Circuit, that once PECo began to seriously consider changes to the pension plan, it had a duty to correct information disseminated before that date to the effect that no change was forthcoming and was also under an affirmative duty to now inform even those participants who did not specifically ask about any such changes that the company was seriously considering an amendment to the pension plan. [*Opinion of the District Court, August 22, 1995,* Appendix at 69a-74a]. The Court then entered an order specifically identifying those members of Subclass A and the amount of damages to which they were entitled. [Appendix at 76a-77a].

Both parties then appealed to the Third Circuit Court of Appeals. The petitioners, on behalf of the Subclass B members, argued that the District Court's decision that serious consideration did not begin until March 1, 1987 was clearly erroneous given the extensive history of PECo's planning efforts before that date. The respondents, to the contrary, argued that the District Court clearly erred in finding that serious consideration began as early as March 1, 1987, arguing that senior management having authority to implement such a pension plan change had not considered such a program until June 1987.

Despite the factual nature of the decision made by the District Court, the Court of Appeals reversed the decision of the District Court in favor of the Subclass A plaintiffs, finding that serious consideration of the pension plan change did not begin until May 28, 1987, thereby precluding members who retired before that date from recovery; and secondly, as to those class members who

retired after May 28, 1987, that their claims were barred by the applicable statute of limitations under ERISA set forth in 29 U.S.C. §1113.

To reach the decision regarding the date when serious consideration began, the Court in Kurz II relied upon the new definition of serious consideration espoused by the Court in Fischer v. Philadelphia Electric Co., 96 F.3d 1533, 1539 (3d Cir. 1996), [Fischer II]. Kurz v. Philadelphia Electric Co., 96 F.3d 1544, 1548 (3d Cir. 1996) [Kurz II, Appendix at 7a-8a]. In Fischer II, the Court redefined serious consideration as follows:

> "... We believe that the following formulation of serious consideration is appropriate: serious consideration of a change in plan benefits exists when (1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement the change." [Fischer II, Appendix at 34a].

The Court determined that these three factors must interact and coalesce to form a composite picture of serious consideration. The Court's further explanation of these factors underscores the restrictiveness of this definition which had the intended result of precluding the Subclass A petitioners, who the District Court after reviewing a substantial amount of evidence had concluded were indeed misled by the affirmative misrepresentations of PECo, from recovering. While lengthy, the Court's explanation bears citation in full here:

> "The first element, a specific proposal, distinguishes serious consideration from the antecedent steps of gathering information, developing strategies, and analyzing options. A company must necessarily go through these preliminary steps before its deliberations can reach the serious stage. This factor does not mean, however, that the proposal must describe the plan in its final form. A specific proposal can contain several alternatives, and the plan as finally implemented may differ somewhat

from the proposal. What is required, consistent with the overall test, is a specific proposal that is sufficiently concrete to support consideration by senior management for the purpose of implementation.

The second element, discussion for implementation, further distinguishes serious consideration from the preliminary steps of gathering data and formulating strategy. It also protects the ability of senior management to take a role in the early phases of the process without automatically triggering a duty of disclosure. This factor recognizes that a corporate executive can order an analysis of benefits alternatives or commission a comparative study without seriously considering implementing a change in benefits. Preliminary stages may also require interaction among upper level management, company personnel, and outside consultants. These discussions are properly assigned to the preliminary stages of company deliberations. Consideration becomes serious when the subject turns to the practicalities of implementation.

The final element, consideration by senior management with the authority to implement the change, ensures that the analysis of serious consideration focuses on the proper actors within the corporate hierarchy. As noted, large corporate entities conduct regular or on-going reviews of their benefit packages in their ordinary course of business. These entities employ individuals, including middle and upper-level management employees, to gather information and conduct reviews. The periodic review process may also entail contacting outside consultants or commissioning studies. During the course of their employment, the employees assigned these tasks necessarily discuss their duties and the results of their studies. These discussions may include issues

> of implementation. The employees may also make recommendations to upper level management or senior executives. As a general rule, such operations will not constitute serious consideration. These activities are merely the ordinary duties of the employees. Until senior management addresses the issue, the company has not yet seriously considered a change.
>
> Consideration by senior management is also limited to those executives who possess the authority to implement the proposed change. This focus on authority can be used to identify the proper cadre of senior management, but it should not limit serious consideration to deliberations by a quorum of the Board of Directors, typically the only corporate body that in a literal sense has the power to implement changes in benefits packages. It is sufficient for this factor that the plan be considered by those members of senior management with responsibility for the benefits area of the business, and who ultimately will make recommendations to the Board regarding benefits operations." Id, 96 F.3d at 1539-1540. [Appendix at 34a-35a].

On October 1, 1996, the Court of Appeals entered judgment in favor of the respondents holding that serious consideration did not arise until May 28, 1987. Despite the fact that PECo was admittedly engaged in gathering information from outside consultants concerning development of a pension plan change way before that date, the Court held that those petitioners who were told that no plans were in the works were not misled because PECo had not been seriously considering those plans for implementation until J.L. Everett, III, PECo's chief executive officer, and John H. Austin, Jr., PECo's president and chief operating officer, considered a request by Charles Fritz, to proceed further with the recommendation of a specific proposal for a pension plan change. The Court also reversed the decision in favor of those Subclass A members who retired after the date of serious consideration, holding that their claims were time-barred by the three year "actual

knowledge" statute of limitations set forth in ERISA, 29 U.S.C. §1113, which governs the limitations period for breaches of fiduciary duty. Thereafter, petitioners Frank Monzo, Martin Morgan, and Gloria McEntee, filed a petition for rehearing on the basis that the respondents failed to meet their burden of proof regarding the "actual knowledge" standard for the statute of limitations which the Third Circuit held was applicable. The Court of Appeals denied the Petition for Rehearing on May 7, 1997. [Appendix at 144a-146a]. The petitioners have filed a timely Petition for Writ of Certiorari to this Honorable Court.

REASONS FOR GRANTING THE WRIT FOR CERTIORARI

It is respectfully submitted that this Honorable Court should grant certiorari in this case for the following compelling reasons: First, the restrictive definition of "serious consideration" imposed by the Third Circuit Court of Appeals establishes an important decision on the interpretation of fiduciary duties imposed by ERISA which has not been settled by the Supreme Court. Because this decision could impact plan participants and companies throughout the country, the Supreme Court, as final arbiter of federal issues arising under ERISA, should finally determine when the fiduciary obligation to inform plan participants of potential changes to a pension plan arises, particularly under circumstances where, as here, the plan fiduciary is aware that participants are asking questions regarding such changes in order to make important decisions as to if and when to retire.

Secondly, the restrictive three prong test of serious consideration imposed by the Court of Appeals permits plan fiduciaries to advise participants that there are no plans for a change to the pension plan at a time when the company is indeed undertaking considerable planning efforts towards such a goal. At the very least, this communication, authorized by the decision of the Court of Appeals, is misleading and as such, is in contravention to the policies established by this Court in the recent case of Varity Corp. v. Howe, ___ U.S. ___, 134 L. Ed.2d, 116 S. Ct. 1065 (1996).

Third, there is a serious conflict among the Circuit Courts which have been asked to address this issue under factual circumstances similar to the instant case. If this conflict is left unresolved, companies offering benefit plans, particularly those which operate on a country-wide basis, will be in the position of not being able to determine when, under ERISA, they are obliged to inform plan participants of potential changes to a pension plan. At one end of the spectrum is the decision of the Second Circuit in Ballone v. Eastman Kodak Co., 109 F.3d 117 (2nd Cir. 1997), wherein the Court concluded, relying principally upon the Supreme Court's decision in Varity Corp. v. Howe, supra, that a fiduciary duty to refrain from making affirmative material misrepresentations may arise even before a future plan change is under serious consideration. The Court recognized that serious consideration, while relevant to the determination of the materiality of a misrepresentation, is not a prerequisite and is certainly not the sine qua non of materiality. At the opposite end of the spectrum is Muse v. International Business Machines Corp., 103 F.3d 490 (6th Cir. 1996), cert. denied, 137 L.Ed.2d 1048 (1997), wherein the Court concluded that not only must the plaintiffs prove that a plan change was under serious consideration before a fiduciary duty exists, but that serious consideration does not arise until a company focuses on one particular plan for a particular business purpose. Under the Sixth Circuit's new test, serious consideration arises only when the employer has a concrete, defined plan in place, to the exclusion of all other variable or alternative enhanced plans and implementation of that concrete plan is inextricably tied into a specific triggering business event. The Eighth Circuit in Wilson v. Southwestern Bell Telephone Company, 55 F.3d 399 (8th Cir. 1995), took a middle ground position, requiring a finding of serious consideration, but not imposing such strict limitations on the definition thereby appropriately permitting the trier of fact to consider all of the evidence which may, as in this case, clearly establish that the company was seriously considering a change to the pension plan at a time before a specific proposal was under discussion by senior management having authority to implement such a plan. The Tenth Circuit, however, in the case of Hockett v. Sun Company, Inc., 109 F.3d 1515 (10th Cir. 1997) has followed the three prong test established in Fischer II, supra. Unequivocally,

the confusion created by these diverse decisions in the Circuit Courts of Appeals should be resolved by the Supreme Court.

Finally, there is a split in the Circuit Courts of Appeals concerning the interpretation of the six year statute of limitations for breaches of fiduciary duties in cases of fraud or concealment as set forth in 29 U.S.C. §1113 of ERISA which is of sufficient significance to warrant review by the Supreme Court.

A. This Case Presents an Important Question of Federal Law that has not been Settled by the Supreme Court.

ERISA protects employee pensions by, in part, imposing certain general fiduciary duties applicable to the management of pension benefit plans. See, ERISA §404, 29 U.S.C. §1104. [Appendix at 147a]. Indeed, ERISA requires a fiduciary to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." ERISA §404(a), 29 U.S.C. §1104(a). Id.

The duties of an ERISA fiduciary are not limited by the statute's expressed provisions, but instead, include the duties derived from common law trust principles. Varity Corp. v. Howe, supra. The fiduciary requirements imposed under ERISA have been described as having the following three components: "(a) duty of loyalty pursuant to which all decisions regarding an ERISA plan 'must be made with an eye single to the interest of the participants and beneficiaries.'" Donovan v. Bierwirth, 680 F.2d 263, 273 (2nd Cir. 1982); the "prudent man" fiduciary obligation which, when combined with the duty of loyalty, imposes an unwavering duty on an ERISA trustee to make decisions with single-minded devotion to plan participants and beneficiaries and in so doing to act as a prudent person would act in a similar situation. Morse v. Stanley, 732 F.2d 1139, 1145 (2d Cir. 1984); and finally, an ERISA fiduciary must act "for the exclusive purpose" of providing benefits to plan beneficiaries. Donovan v. Bierwirth, supra at 271.

In judicially defining the scope of these fiduciary duties, the United States Supreme Court has recently confirmed that intentional

misrepresentations are inconsistent with the duty of loyalty owed by all fiduciaries and codified in Section 404(a)(1) of ERISA. Varity Corp. v. Howe, supra, 116 S. Ct. at 1074.

The question which the petitioners ask this Court to review -- when does an ERISA fiduciary have an obligation to truthfully inform plan participants that it is considering a change to the pension plan -- presents an issue of first impression before this Court which many courts of appeals around the country have been asked to address under factual circumstances similar to the instant case. See, Hockett v. Sun Co., supra; Ballone v. Eastern Kodak Co., supra; Muse v. International Business Machines Corp., supra; Vartanian v. Monsanto Co., 14 F.3d 697 (1st Cir. 1994); Mullins v. Pfizer, Inc., 23 F.3d 663 (2d Cir. 1994); Berlin v. Michigan Bell Telephone Co., 858 F.2d 1154 (6th Cir. 1988); Drennan v. General Motors Corp., 977 F.2d 246 (6th Cir. 1992); Wilson v. Southwestern Bell Telephone Co., supra; Maez v. Mountain States Tel. and Tel., Inc., 54 F.3d 1488 (10th Cir. 1995). Most of the courts addressing the issue have determined that the duty to inform (or stated otherwise, the duty to refrain from affirmative material misrepresentations) arises when plans to change a pension benefit are under "serious consideration." Guidance is required from the United States Supreme Court to determine just exactly what constitutes "serious consideration" for purposes of invocation of this fiduciary duty.

Petitioners submit that the Second Circuit has appropriately determined that "serious consideration" is not the key factor in deciding if an employer has breached its fiduciary duty under ERISA to speak truthfully about future benefits; rather, the important question to be decided by the trier of fact is whether, based on all of the evidence presented, the alleged misrepresentation by the employer regarding future benefits was material to the employee's retirement decision. Ballone v. Eastman Kodak Co., supra. As the Ballone Court recognized:

> Regardless whether the employer is seriously considering altering its retirement plan, the employer's false assurance that future

> enhancements have been ruled out for some specific period can be decisive in inducing an employee to hasten retirement, rather than delay in the hope of receiving enhanced future benefits. **This aspect of the assurance can render it material regardless of whether future changes are under consideration at the time the misstatement is made.** Id., 109 F.3d at 124. [Emphasis added].

The Ballone Court appropriately determined that the trier of fact should analyze all of the evidence to determine whether the representations made by the employer/fiduciary were materially false. To the contrary, the Third Circuit in Fischer II, has essentially usurped the function of the trier of fact by defining "serious consideration" in such a restrictive manner that the duty to truthfully inform plan participants about a possible change to the pension plan can almost never arise until the end stage of an exhaustive planning process when senior management decides to recommend such a change to the person who has the ultimate authority to implement the amendment.

The predictable impact of the Third Circuit's far reaching decision is to enable companies to mislead plan participants into believing that no change to the pension plan is being contemplated when, at the same time, senior management has indeed delegated to middle management the responsibility to plan such a change. Under the Third Circuit's definition of "serious consideration," such action would not invoke the fiduciary duty to truthfully inform inquiring plan participants of this activity even if senior management knows that recommendation of such a plan change is inevitable given the particular circumstances with which the company is faced. Indeed, the instant case provides an excellent example of this scenario.

The extensive history of PECo's planning efforts submitted to the District Court for consideration, and set forth above, clearly established that: (1) as early as 1985, PECo projected that it would

improve the pension plan formula by no later than January 1, 1988; (2) PECo's pension benefits were continuing to deteriorate in comparison with other surveyed utility companies and in fact, the data from the 1986 pension study received in February 1987 confirmed that PECo's pension benefits had become fairly non-competitive; (3) senior management charged with the responsibility of developing a pension plan change proposal, Mr. Frederick Beaver already contacted an outside consultant, TPF&C, as of February 27, 1987 to begin costing out a pension formula that represented a change to the pension plan. Mr. Fritz, the vice president of personnel and industrial relations, who was the person to take proposals which had been developed by TPF&C to the Board of Directors to formally request a change to the pension plan, was aware of Mr. Beaver's action. Despite the fact that there was a specific event which made consideration of a pension plan change necessary (the deterioration of PECo's pension benefits) and its eventual recommendation to the Board of Directors inevitable, and despite the fact that the development of the pension plan proposal was being marshalled by Mr. Beaver and Mr. Fritz in accordance with their duties, their activity in preparing proposals for the pension plan change did not constitute "serious consideration" under the Third Circuit's three-prong test because they were not senior management having the ultimate authority to recommend such a change to the Board of Directors. The Third Circuit has thus approved of PECo's action in telling plan participants that no changes to the pension plan were being contemplated at a time not only when PECo was indeed spending thousands of dollars to develop proposals, but at a time when Mr. Fritz in fact advised the executives of the IGA (an employee group) that the timing was right for making significant changes in the pension plan. Left unchallenged, the Third Circuit's three-prong test sets a dangerous precedent which is detrimental to the protection afforded to plan participants under ERISA. For this reason, certiorari should be granted so that the Supreme Court can finally determine when the fiduciary duty to truthfully inform plan participants of future pension changes arises.

B. The Third Circuit's Decision Conflicts with the Duties of a Fiduciary under ERISA as Espoused by this Court.

In Varity Corp. v. Howe, supra, the United States Supreme Court recently reviewed the circumstances under which an employer who was also a plan administrator has fiduciary obligations to plan participants when communicating about plan benefits. The Court held that "conveying information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued participation, would seem to be an exercise of a power appropriate to carrying out an important plan purpose," and as such gives rise to the fiduciary obligations under ERISA. Varity Corp. v. Howe, supra, 116 S. Ct. at 1073. Once reaching that decision, the Court had no difficulty in deciding that in misleading beneficiaries, the employer violated the fiduciary obligations that ERISA §404 imposes upon plan administrators, noting as other courts have held that "lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in Section 404(a)(1) of ERISA. Id, 116 S. Ct. at 1074 [citations omitted].

This Court's decision in Varity v. Howe, supra, makes it abundantly clear that a plan fiduciary cannot affirmatively mislead plan participants about the likely future of plan benefits. Under the Third Circuit's three-prong test of serious consideration, however, a company can effectively engage in such conduct without violating ERISA fiduciary imposed duties. Consider this possibility. A company president advises the manager of corporate benefits that he needs to reduce costs quickly and asks the manager to develop proposals, including an early retirement incentive, to accomplish this goal. The manager then, on instruction from the president, seeks outside assistance in developing such plans for ultimate consideration by those with authority to recommend such a plan to the Board of Directors. Despite the fact that the mandate came from the president of the company himself who had a precise goal in mind, to reduce costs quickly, the company would still have the right under the Third Circuit's definition of serious consideration, to inform inquiring plan participants that there were no such plans being contemplated. It is submitted that even though permitted under the Third Circuit's definition of serious consideration, such a statement is misleading, and consequently, contrary to the policies established under ERISA for the protection of employee benefits as espoused by the United States Supreme Court in Varity v. Howe, supra.

C. The Third Circuit's Decision Conflicts with Decisions of other Courts of Appeals.

The case under review is indirect and irreconcilable conflict with Ballone v. Eastman Kodak Company, supra, and this conflict further illustrates the growing confusion which exists in the lower Federal Courts regarding the scope of an employer's fiduciary duty to communicate truthfully with employees regarding future benefit plans.

Similar to the instant case, the approach of the District Court in Ballone limited its deliberation to a single question -- whether the employer was seriously considering implementing an enhanced plan at the time it made the alleged misrepresentations. The District Court concluded that since the plan was not under serious consideration, any alleged misrepresentations were immaterial. The Second Circuit, however, disagreed with the District Court's approach:

> We first address the District Court's conclusion that "serious consideration" of a plan change is the prerequisite to materiality, where a plan fiduciary makes alleged misrepresentations to ERISA plan beneficiaries leading them to believe that future plan changes have been ruled out. We hold that it is not. We next address the Court's conclusion that absent serious consideration of plan changes, no statement about future plan benefits can be misleading. We disagree with the District Court's conclusion on this point as well. Id, 109 F.3d at 122.

Relying principally on Varity Corp. v. Howe, supra, the crux of the Second Circuit holding is captured in the following:

> Applying these trust-law principles, it is clear that Kodak may not actively misinform its plan beneficiaries about the availability of future retirement benefits to induce them to retire earlier than they otherwise would, **regardless of whether or not it is seriously considering future plan changes.** Kodak has a duty to deal fairly and honestly with its beneficiaries. Id, 109 F.3d at 124. [Emphasis added].

The holding in Ballone is in direct conflict with the Third Circuit's opinions in Fischer II and Kurz II, and the Tenth Circuit's opinion in Muse v. International Business Machine Corp., supra, wherein the Courts held that serious consideration was the **only** factor which would trigger the employer's duty to truthfully inform plan participants about future benefits under ERISA.

The Third Circuit's decision is also in conflict with the decision of the Eighth Circuit, in Wilson v. Southwestern Bell Telephone Company, supra, wherein the Court, although relying on the "serious consideration" test, left the question of when serious consideration begins up to the trier of fact who, after all, is in the best position to weigh and evaluate all of the evidence in the context in which it is presented. No restrictive three prong test or other definition of serious consideration is imposed upon the trier of fact by the Eighth Circuit. To this extent, the novel, three prong test developed by the Third Circuit is in conflict with the decision of the Eighth Circuit.

In reality, the Third Circuit's opinions in Fischer II and Kurz II are also in conflict with the Third Circuit's initial decisions in these case. In Fischer I, the Court likewise concluded that the determination of whether "the content of the particular communications PECo allegedly made to members of the plaintiff class and whether such communications constituted affirmative misrepresentations are questions of fact properly left to the trier of

fact on remand." Fischer I, supra, 994 F.2d at 135. [Appendix at 89a]. It is obvious that after the District Court fulfilled its obligation as the trier of fact to determine when serious consideration began in this case, the new panel for the Third Circuit Court of Appeals hearing the case on the second appeal was unhappy with the outcome and therefore developed a restrictive definition of serious consideration which would assure that serious consideration can never be deemed to begin until all of the planning efforts for a change to pension benefits is virtually completed and recommendation to the person with ultimately authority to implement such changes is imminent.

Significantly, in the first appeal in the Kurz, case supra, the Third Circuit rejected the imposition of a bright-line rule in determining when an affirmative misrepresentation is material recognizing that "any approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive." Id, 994 F.2d at 139 (Appendix at 97a), quoting Basic Inc. v. Levinson, 485 U.S. 224, 236, 108 S. Ct. 978, 986, 99 L. Ed.2d 194 (1988). Yet, the three prong test unequivocally establishes such a bright-line rule in the sense that it does not permit the trier of fact to take into consideration fact specific evidence which may lead to the conclusion that serious consideration began before the three prong test is satisfied.

This conflict among the Circuits should be resolved by the Supreme Court, particularly given the far-reaching implications of the Third Circuit Court of Appeals' decision.

D. The Third Circuit's Decision Regarding the Applicable Statute of Limitations Conflicts with Decisions of Other Courts of Appeals.

On remand to the District Court, the respondents raised the statute of limitations as a defense to petitioners' claims based upon PECo's breach of fiduciary duties, arguing that the three year "actual knowledge" statute of limitations set forth in ERISA, 29

U.S.C. §1113 (Appendix at 147a) barred the petitioners' action which was filed approximately three and one-half years after the announcement by PECo of the pension plan change. The District Court, however, disagreed that the petitioners' claims were barred, finding that the six-year exception to the three year statute of limitations in cases involving fraud or concealment was applicable and that therefore the petitioners' claims were timely filed. The Third Circuit reversed, holding that the six-year statute of limitations for fraud or concealment was not applicable because there was no claim that PECo had attempted to conceal its alleged breach of fiduciary duty. In this respect, the Third Circuit has joined the First, Seventh, Eighth, Ninth and D.C. Circuits in finding that this statute of limitations incorporates the federal doctrine of fraudulent concealment, meaning that the defendant must have taken affirmative steps to hide the underlying breach of fiduciary duty for the six year statute of limitations to be applicable. Stated otherwise, these courts have held that the mere fact that the underlying breach of fiduciary duty involves a claim of fraud or concealment is not sufficient to trigger the six year statute of limitations for fraud or concealment. Kurz v. Philadelphia Electric Co., supra, 96 F.3d at 1552; J. Giels Band Employee Benefit Plan v. Smith Barney Shearson, Inc., 76 F.3d 1245 (1st Cir. 1996), cert. denied, 136 L.Ed.2d 39, 117, S.Ct.81 (1996); Barker v. American Mobile Power Corp., 64 F.3d 1397 (9th Cir. 1995); Larson v. Northrop Corp., 21 F.3d 1164 (D.C. Cir. 1994); Martin v. Consultants and Administrators, Inc., 966 F.2d 1078 (7th Cir. 1992); Shaefer v. Arkansas Medical Society, 853 F.2d 1487 (8th Cir. 1988). To the contrary, the Second Circuit has considered this issue and held that "for a breach of fiduciary duty involving fraud or concealment, the three year exception of actual knowledge does not apply, and a party has six years from the time it discovered the breach to bring an action." Diduck v. Kaszycki & Sons Contractors, Inc., 874 F.2d 912, 919 (2d Cir. 1989). Petitioners submit that the United States Supreme Court must intervene to resolve this dispute among the circuits, particularly in view of the fact that the majority of the circuits are interpreting the statute in a manner inconsistent with its clear language.

CONCLUSION

The Petition for Writ of Certiorari should be granted as to carry out the Court's mandate that honesty should prevail in the administration of pension plans by employer fiduciaries.

Respectfully submitted:

Ronald L. Wolf, Esquire*
Martina W. McLaughlin, Esquire
LITVIN, BLUMBERG, MATUSOW & YOUNG
The Widener Building, 18th Floor
1339 Chestnut Street
Philadelphia, PA 19107
(215) 557-3300
Counsel for Petitioners
**Counsel of Record*

Filed October 1, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 95-1795 and 95-1796

DONALD R. KURZ; WILLIAM ANDERSON; JAMES E.W. BECK; WILLIAM T. BERGEN; CHARLES W. BOWDEN; WILLIAM H. BROWN; RICHARD CAHILL; ARMANDO L. CAPOFERRI; ROBERT C. DEMARCO; JAMES J. DILOLLE, SR.; VINCENT J. DIMAGGIO; JOHN J. DIVALENTINO, JR.; WILLIAM E. DRUMEL; VICTOR J. GIBIALANTE; FRANCIS T. GOLDEN; JAMES J. GRANGER; ELMER D. GREIM, JR.; JAMES H. HAIR; JOHN M. HOOPES; BENJAMIN J. KILIAN; GEORGE C. LINTHICUM; HUBERT A. MCKOWN, JR.; HENRY P. MCNAMEE; OLIVER K. MESSNER; ROBERT E. MILLER; JOHN A. MORSE; SAMUEL J. MULLEN; JOHN A. MUNLEY; STANLEY B. MYERS; JOHN J. NUSSPICKEL; JAMES W. PATTERSON; ALFRED B. SCHUMANN; JOSEPH C. SHARKEY; WILLIAM H. SMOYER; WOODROW E. SNYDER; JAMES D. SUTLIFF; EDWARD J. VETNER; DOMINIC C. VIGLIANESE; G. EARLE WATT; FREDERICK W. WINTERLING; JOHN R. YOUNG

v.

PHILADELPHIA ELECTRIC COMPANY; SERVICE ANNUITY PLAN OF PHILADELPHIA ELECTRIC COMPANY; CHARLES L. FRITZ; J.L. EVERETT, III; JOHN H. AUSTIN, JR.

JOHN J. DIVALENTINO, JR.; WILLIAM E. DRUMEL; JOHN A. MORSE; SAMUEL J. MULLEN; STANLEY B. MYERS; DOMINIC C. VIGLIANESE; JAMES J. DILOLLE; BENJAMIN J. KILIAN; CHARLES W. BOWDEN; ELMER D. GREIM, JR.; FREDERICK W. WINTERLING; JAMES W. BECK; JAMES H. HAIR; ROBERT C. DEMARCO; ALFRED G. SCHUMANN; RICHARD CAHILL; JAMES W. PATTERSON; JOHN M. HOOPES; HUBERT A. MCKOWN, JR.; ROBERT E. MILLER; JAMES D. SUTLIFF; HENRY P. MCNAMEE; FRANCIS T. GOLDEN; WILLIAM T. BERGEN; GEORGE C. LINTHICUM; WILLIAM W. ANDERSON; JOHN R. YOUNG; VINCENT J. DIMAGGIO; SHIELDS L. DALTROFF; RICHARD O. FOLKMAN; ALFRED E. STAVOLA; ROBERT H.C. LESS; SAMUEL E. BELL; DONALD F. WASHINGTON; FRANK J. GALLAGHER; MAURICE M. PEITZMAN; HARRY G. TURNER, JR.; ROBERT I. FRIEND; DONALD C. ROBINSON; WILLIAM J. LEAMAN, JR.; AUGUSTUS W. O'MALLEY; DALLAS S. SCOTT, JR.; JOHN S. STILLWAGON; ROBERT C. HECKESSER; WILLIAM R. TRAVETTI; WILLIAM B. HORLOCK; JAMES STATES; THOMAS W. RAYER; JOHN H. VONRHINE; WALTER ALLWOERDEN; GEORGE C. WIEDERSUM, JR.; JAMES R. MCCARRON; SALVATOR J. DESTEFANO; JOHN C. GARVIN; A. WILLIAM LANCASTER; JOSEPH A. FOCHT; ROBERT MITCHELL; JOSEPH P. SUBRANNI; JOHN F. CRAWFORD; WILLIAM G. TAYLOR; KENNETH R. SEDGLEY, JR.; IRWIN G. BLACKBURN; CHARLES R. CAREY; JOHN R. YOUNG; JESSEE E. GRAY, JR.; JAMES D. DERSTINE; ALLEN H. BRAID; PAUL L. THOMAS; STEPHEN MICKLOSH, JR.; WILLIAM L. GIBBONS; RUSSELL B. MURRAY; ROLAND J. MARKUN; ERNEST W. BEAM; RAYMOND W. SCHOLL, JR.; JOHN F. PARKER; JOSEPH F. MCBRIDE; VINCENT S. BOYER; MARTIN M. MORGAN and DAVID MONZO,

Appellants in 95-1795

DONALD R. KURZ; WILLIAM ANDERSON; JAMES E.W. BECK; WILLIAM T. BERGEN; CHARLES W. BOWDEN; WILLIAM H. BROWN; RICHARD CAHILL; ARMANDO L. CAPOFERRI; ROBERT C. DEMARCO; JAMES J. DILOLLE, SR.; VINCENT J. DIMAGGIO; JOHN J. DIVALENTINO, JR.; WILLIAM E. DRUMEL; VICTOR J. GIBIALANTE; FRANCIS T. GOLDEN; JAMES J. GRANGER; ELMER D. GREIM, JR.; JAMES H. HAIR; JOHN M. HOOPES; BENJAMIN J. KILIAN; GEORGE C. LINTHICUM; HUBERT A. MCKOWN, JR.; HENRY P. MCNAMEE; OLIVER K. MESSNER; ROBERT E. MILLER; JOHN A. MORSE; SAMUEL J. MULLEN; JOHN A. MUNLEY; STANLEY B. MYERS; JOHN J. NUSSPICKEL; JAMES W. PATTERSON; ALFRED B. SCHUMANN; JOSEPH C. SHARKEY; WILLIAM H. SMOYER; WOODROW E. SNYDER; JAMES D. SUTLIFF; EDWARD J. VETNER; DOMINIC C. VIGLIANESE; G. EARLE WATT; FREDERICK W. WINTERLING; JOHN R. YOUNG

v.

PHILADELPHIA ELECTRIC COMPANY; SERVICE ANNUITY PLAN OF PHILADELPHIA ELECTRIC COMPANY; CHARLES L. FRITZ; J.L. EVERETT, III; JOHN H. AUSTIN, JR.

Peco Energy Company, formerly Known as Philadelphia Electric Company, Service Annuity Plan of Philadelphia Electric Company, Charles L. Fritz, J.L. Everett, III and John H. Austin, Jr.

Appellants in 95-1796.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 91-cv-02771)

Argued April 29, 1996

Before: COWEN and ROTH, *Circuit Judges* and CINDRICH,[1] *District Judge*

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1. Honorable Robert J. Cindrich, United States District Court Judge for the Western District of Pennsylvania, sitting by designation.

(Opinion filed October 1, 1996)

Ronald L. Wolf, Esq.
Martina W. McLaughlin, Esq.
(Argued)
Litvin, Blumberg, Matusow & Young
1339 Chestnut Street
The Widener Building, 18th Floor
Philadelphia, PA 19107

Attorneys for Appellants in
95-1795 and for Cross-Appellees
in 95-1796

David H. Marion, Esq.
David Zalesne, Esq. (Argued)
Howard J. Bashman, Esq.
Montgomery, McCracken, Walker &
Rhoads
Three Parkway, 20th Floor
Philadelphia, PA 19102

Attorneys for Appellees in 95-1795
For Cross-Appellants in 95-1796

OPINION OF THE COURT

ROTH, *Circuit Judge*:

This appeal marks the second time this case has reached this court. In its first incarnation, *Kurz v. Philadelphia Elec. Co.*, 994 F.2d 136 (3d Cir.) ("*Kurz I*"), *cert. denied*, 510 U.S. 1020 (1993), we reversed the district court's grant of summary judgment to defendant Philadelphia Electric Co. ("PECo"). Applying the rule established in *Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130 (3d Cir.) ("*Fischer I*"), *cert. denied*, 510 U.S. 1020 (1993), we held that genuine issues of material fact remained as to whether PECo, acting in its role as fiduciary under the Employee Retirement Income Security Act ("ERISA"), had made affirmative material misrepresentations to its employee-beneficiaries by

denying, or failing to disclose when asked, that it was seriously considering changes in its pension benefits program. On remand, after a bench trial, the district court entered judgment for those members of the plaintiff class who had asked about a change in benefits after March 1, 1987, the date on which the district court found that serious consideration began. *Kurz v. Philadelphia Elec. Co.*, No. 91-2771, slip op. at 24 (E.D. Pa. May 13, 1994) ("*District Ct. Op.*"). We will apply the formulation of "serious consideration" established in *Fischer v. Philadelphia Elec. Co.*, ___ F.3d ___ (3d Cir. 1996) ("*Fischer II*"), and on the basis of that analysis we will reverse the district court's decision and enter judgment for defendant PECo.

I.

This action stems from PECo's efforts to change its pension plan to provide more lucrative benefits to its employees. PECo announced this change on July 2, 1987, and implemented it on August 1, 1987. The plaintiff class consists of various employees who retired between February 1, 1987, and July 1, 1987, and who were therefore ineligible for the plan.

On April 30, 1991, the plaintiffs filed suit in the U.S. District Court for the Eastern District of Pennsylvania, alleging that PECo had long known of its intent to change its pension package and had breached its fiduciary duty under ERISA § 404, 29 U.S.C. § 1104, by representing that no change was under consideration. The district court certified the class, then entered summary judgment for PECo. In *Kurz I*, we reversed. Relying on our decision in *Fischer I*, we held that PECo could be liable for breach of fiduciary duty if it had made affirmative misrepresentations, such as denying that any change was being considered when in fact a change was under serious consideration. *Kurz I*, 994 F.2d at 139. We remanded for a trial on the merits to determine, *inter alia*, when the plan came under serious consideration. The district court found the following facts, the vast majority of which were stipulated.

Since 1977, PECo had conducted periodic reviews of its pension fund program as part of its ordinary course of

business. PECo also participated in an annual or biannual survey that compared benefits packages at selected utilities.

On October 2, 1985, the consulting firm of Towers, Perrin, Forster & Crosby ("TPF&C") completed a study of PECo's pension benefit plan. TPF&C concluded that the plan was well-funded and that the current rate of contributions would be sufficient to cover improvements in the benefits package. At approximately the same time, Michael Crommie, PECo's Director of Employee Services, noted that PECo's comparative ranking in the benefits survey had fallen. On June 23, 1986, Crommie sent a memorandum to Ronald Downs, Manager of the Industrial Relations Department, asking whether TPF&C should be asked to prepare a pension benefit study based on the survey results. Downs responded, "Probably not, but suggest we consider after we see [this year's] survey results. Obviously, some input from TPF&C will be required with regard to our recommended modifications to plan!"

In 1986, PECo took over the task of compiling the benefits survey. Fred Beaver, an Administrative Assistant in the Personnel and Industrial Relations Department,[2] was assigned the task of preparing the survey. In February, 1987, Beaver received data from other utilities on their 1986 benefits levels. Beaver concluded that PECo's position was below the mid-point for the industry. After discussing the matter with his colleagues, Beaver suggested that PECo increase its benefits. On February 27, 1987, Beaver contacted Donald Fleischer, a consultant at TPF&C, to discuss a possible pension plan change.

During March, 1987, the pace of deliberations increased. Charles L. Fritz, PECo's Vice President of Personnel and Industrial Relations, met with members of the Independent Group Association, PECo's unofficial employee

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2. The careful reader will note an apparent inconsistency between Beaver's position in 1987 and his position in 1988, when he played a role in the events giving rise to the *Fischer* litigation. *See Fischer II*, ___ F.3d at ___ [typescript at 7]. The record indicates that during the interim, PECo began referring to the Personnel and Industrial Relations Department as Human Resources.

representative, to discuss an increase in pension benefits. Fritz told them that the time was ripe to make significant changes in the pension plan. It was also during March that TPF&C began calculating the results of various changes in the pension benefit rate. TPF&C continued its work through April and May.

On May 6, 1987, Crommie and William Murdoch, a consultant with TPF&C, met to discuss competing alternatives for the amended plan. On May 11, Fritz reviewed the costs of the various alternatives with Murdoch. On May 20, TPF&C presented the results of its pension benefit study and recommended a pension increase. The TPF&C report discussed seven different proposals for changing the plan. By memorandum dated May 28, Fritz contacted J.L. Everett, III, PECo's Chief Executive Officer, and John H. Austin, Jr., PECo's President & Chief Operating Officer, to request permission to recommend a pension change to the Board of Directors. Everett and Austin were the only two individuals with authority to make recommendations to the Board. After receiving permission, Fritz prepared a recommendation, which was approved at the Board's June 22, 1987, meeting.

Based on this record, the district court concluded that PECo began seriously considering an increase in its pension benefit plan in March, 1987. It therefore set March 1, 1987, as the date on which PECo's duty to inform its employees arose. The district court entered judgment for those retirees who asked about pension benefits and retired after that date. The court entered judgment for PECo on the claims of those retirees who asked about pension benefits and retired before that date. This appeal followed.

II.

Our analysis proceeds within the confines of *Fischer I* and *Fischer II*. Liability turns on the materiality of PECo's representation that no change was being considered. *Fischer I*, 994 F.2d at 135.[3] Under *Fischer II*, whether

3. Although the *Fischer I* court refers to a "misrepresentation," we believe that the above language more accurately describes our holding in both *Fischer I* and *Fischer II*. We therefore refer to statements made before a change is under serious consideration as "representations."

PECo's statement was a material "misrepresentation" turns on whether a change in benefits was in fact under serious consideration at the time the statement was made. *Fischer II*, ___ F.3d at ___ [typescript at 11-12]. "[S]erious consideration requires (1) a specific proposal (2) discussed for purposes of implementation (3) by senior management with the authority to implement the change." *Id.* at ___ [typescript at 15]. Based on this formulation, the district court's conclusion that serious consideration began on March 1, 1987, was incorrect.[4]

Under the first *Fischer II* factor, we must examine the record for evidence of a specific proposal. No such proposal existed until May 20, 1987, when TPF&C presented the results of its pension benefits study. The TPF&C report

> noted that PECO's normal retirement benefits were below average of the survey group . . . . It commented that PECO needed to improve its pension, [and it] recommend[ed] that alternative pension improvements should take into consideration 1. objectives for income replacement at various pay levels, 2. the company's desired competitive posture, 3. cost implications for alternatives, 4. posture with respect to introduction of company-matching contribution in savings plan, and 5. other benefits such as life insurance and medical benefits.

District Ct. Op. at 12. Most importantly, the study "proposed seven alternate benefit improvements." *Id.* at 13.

This document marked the culmination of PECo's considerable efforts, with the help of TPF&C, to "gather[] information, develop[] strategies, and analyz[e] options." *Fischer II*, ___ F.3d at ___ [typescript at 16]. It provided specific proposals for the company to evaluate, and it outlined factors and principles for senior management to consider. This document was "sufficiently concrete to support consideration by senior management for the

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4. As in *Fischer II*, we note that we would reverse the district court's conclusions on a clearly erroneous standard. We therefore need not determine whether serious consideration is a question of fact or an issue of law. *See Fischer II*, ___ F.3d at ___ n.2 [typescript at 20 n.3].

purpose of implementation." *Id.* [typescript at 16]. Indeed, it appears to have been intended for this very purpose. The TPF&C report therefore satisfies the first *Fischer II* factor.

By contrast, the laundry list of pre-May 20, 1987, events cited by the plaintiff class falls short of serious consideration. These activities fit comfortably within the categories of gathering information, developing strategies, and analyzing options that *precede* the drafting of a specific proposal. As we explained in *Fischer II*,

> large corporate entities conduct regular or on-going reviews of their benefit packages in their ordinary course of business. These entities employ individuals, including middle and upper-level management employees, to gather information and conduct reviews. The periodic review process may also entail contacting outside consultants or commissioning studies. During the course of their employment, the employees assigned these tasks necessarily discuss their duties and the results of their studies. These discussions may include issues of implementation. The employees may also make recommendations to upper level management or senior executives. As a general rule, such operations will not constitute serious consideration.

Fischer II, ___ F.3d at ___ [typescript at 17]. The efforts of Beaver, Crommie, Downs, and other individuals in PECo's seemingly far-flung personnel department illustrate this general rule. These individuals were simply performing their ordinary duties. Their activities do not constitute serious consideration.

Because a specific proposal did not emerge until May 20, 1987, serious consideration could not have commenced before this date. The existence of a specific proposal, however, does not resolve matters.

> [The *Fischer II*] formulation does not turn on any single factor; the determination is inherently fact-specific. *Kurz I*, 994 F.2d at 139. Likewise, the factors themselves are not isolated criteria; the three interact and coalesce to form a composite picture of serious consideration.

Id. at ___ [typescript at 15-16]. Moreover, as we emphasized in *Fischer II*, "these factors do *not* establish a bright-line rule." *Id.* at ___ [typescript at 18]. We therefore turn to the second and third factors.

Under the second and third factors, we look to whether the specific proposal was being considered for implementation by senior management. As noted, *supra*, the contents of the proposal itself suggest that TPF&C intended its report for consideration by senior management for purposes of implementation. What is important for this phase of our inquiry, however, is whether *PECo's* senior management considered the document for purposes of implementation. In addition, consideration must have been by senior management with the authority to implement the change. This final requirement will not limit serious consideration to discussion by the Board of Directors: "It is sufficient for this factor that the plan be considered by those members of senior management with responsibility for the benefits area of the business, and who ultimately will make recommendations to the Board regarding benefits operations." *Id.* at ___ [typescript at 18].

Although the record is sparse on these points, the district court found that "[t]he persons having authority in 1987 to recommend that the PECO Board of Directors implement the pension plan changes were Everett and Austin." *District Ct. Op.* at 14. Based on this finding, we conclude that Everett and Austin were the appropriate cadre of senior management whose consideration is pertinent.

We must therefore determine when Everett and Austin began considering the specific proposal for purposes of implementation. The record indicates that on May 22, 1987, Everett and Austin submitted the TPF&C report to the Board of Directors. On May 28, Fritz sent a memorandum to Austin and Everett setting out the cost for one of the seven proposals and requesting their approval to proceed further. After receiving approval, Fritz prepared a recommendation for the Board. The Board made the decision to amend the plan on June 22, 1987.

We conclude that Fritz's May 28 memorandum and Everett and Austin's subsequent approval of his

recommendation mark the beginning of serious consideration by senior management for purposes of implementation. We therefore hold that serious consideration began on May 28, 1987.

In reaching this conclusion, we stress yet again the fact-specific nature of our analysis. Our holding in this case does not establish a bright-line rule based on management's approval of an employee's request to make a recommendation to the Board of Directors, just as in *Kurz I* we rejected a bright-line rule based on the formal proposal of a plan change to the Board of Directors. 994 F.2d at 139. Rather, serious consideration depends on "(1) a specific proposal (2) discussed for purposes of implementation (3) by senior management with the authority to implement the change." *Fischer II*, ___ F.3d at ___ [typescript at 15]. Here, these factors indicate that serious consideration began on May 28, 1987.

Based on this analysis, any employee who asked about changes in pension benefits after serious consideration began on May 28, 1987, but before the formal announcement of the change on July 2, 1987, received material misinformation. We will enter judgment for PECo on the claims of all employees who asked about a benefits change and retired before May 28. The record reveals, however, that some members of the plaintiff class retired after May 28, 1987. We must therefore consider the viability of their claims in light of PECo's statute of limitations defense.

ERISA § 413, 29 U.S.C. § 1113, establishes a combination of limitations provisions to govern breach of fiduciary duty claims. It provides:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of
>
> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which

> the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C. § 1113. This section thus creates a general six year statute of limitations, shortened to three years in cases where the plaintiff has actual knowledge, and potentially extended to six years from the date of discovery in cases involving fraud or concealment.

Invoking § 413, PECo argues that the three year period for actual knowledge applies. PECo points out that the benefits change was formally announced on July 2, 1987. No lawsuit was filed until April 3, 1991, more than three and a half years later. In addition, the record contains statements by sixteen of the twenty members of the plaintiff class stating that they knew of the plan change more than three years before the complaint was filed. PECo concludes that on these facts, the claim was untimely.

The plaintiff class responds by pointing to § 413's language on fraud and concealment, claiming it refers to the type of behavior in which PECo engaged. The district court adopted this position, explaining,

> The class action complaint clearly sounds in concealment. The heart of the complaint is PECo's concealment of the plan to implement the early retirement plan. PECO admits it had a policy of keeping such matters confidential and telling potential retirees that no such plans existed until formally announced.
>
> Section [413] provides a six year statute of limitation for cases of concealment, measured from the time the plaintiff discovers the breach or violation.
>
> Members of the plaintiffs' class discovered the breach or violation as early as June 1987. Suit was filed in this matter April 30, 1991, less than six years later.

District Ct. Op. at 25-26. We disagree with the district court's interpretation of the statute in the circumstances of this case.

The proper interpretation of § 413 presents an issue of law subject to plenary review. *Board of Trustees of District No. 15 Machinists' Pension Fund v. Kahale Engineering Corp.*, 43 F.3d 852, 857 (3d Cir. 1994); *Sheet Metal Workers, Local 19 v. 2300 Group, Inc.*, 949 F.2d 1274, 1278 (3d Cir. 1991). We first hold that § 413(2)'s three year period applies on the facts of this case. We next hold that the district court misconstrued § 413's fraud and concealment language. We find that the claims of the plaintiff class are untimely and barred.

We begin with the selection of the 6 year or the 3 year limitations period as provided in subsections (1) and (2). We find that the 3 year "actual knowledge" provision of subsection (2) applies here. We first examined the meaning of § 413(2)'s "actual knowledge" in *Gluck v. Unisys Corp.*, 960 F.2d 1168 (3d Cir. 1992). We interpreted the phrase "actual knowledge" to require actual knowledge of "all material facts necessary to understand that some claim exists, which facts could include necessary opinions of experts, knowledge of a transaction's harmful consequences, or even actual harm." *Id.* at 1177 (citations omitted).

In the current case, all the material elements of a breach of fiduciary duty claim were patently obvious on July 2, 1987, the day PECo announced the pension increase. On that date, employees who had asked about benefits and retired before July 2 knew (1) benefits had been increased, (2) they were not eligible for the new package, and (3) no one had told them about the change even though they had asked. This was not a technical violation of ERISA, nor a cleverly concealed plan amendment. PECo openly announced that certain employees would receive better benefits, and others would not. For those who did not qualify, the "harmful consequences" of the change were obvious. *Gluck*, 960 F.2d at 1177. No "opinions of experts" were needed. *Id.* Legal consultation was not required. *Id.* The plaintiffs had "knowledge of all relevant facts at least sufficient to give [them] knowledge that a fiduciary duty

ha[d] been breached or ERISA provision violated." *Id.* at 1178. The plaintiff class therefore had actual knowledge as of July 2, 1987, and § 413's three year statute of limitations began to run on that date.

We next turn to the "fraud and concealment" language of § 413, which the district court applied to save the class's claim. The district court apparently interpreted this language as referring to the type of ERISA claim in question. *See District Ct. Op.* at 25 ("[t]he class action complaint clearly sounds in concealment"). We disagree.

With rare exceptions, the courts of appeals have interpreted the final clause of § 413 as incorporating the federal doctrine of fraudulent concealment: The statute of limitations is tolled until the plaintiff in the exercise of reasonable diligence discovered or should have discovered the alleged fraud or concealment. *See J. Geils Band Employee Benefit Plan v. Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1253 (1st Cir.), *petition for cert. filed*, 65 U.S.L.W. 3001 (June 19, 1996); *Barker v. American Mobil Power Corp.*, 64 F.3d 1397, 1401-02 (9th Cir. 1995); *Larson v. Northrop Corp.*, 21 F.3d 1164, 1172-74 (D.C. Cir. 1994); *Martin v. Consultants & Administrators, Inc.*, 966 F.2d 1078, 1093-96 (7th Cir. 1992); *Schaefer v. Arkansas Medical Soc'y*, 853 F.2d 1487, 1491-92 (8th Cir. 1988); *but see Diduck v. Kaszycki & Sons Contractors, Inc.*, 874 F.2d 912, 919 (2d Cir. 1989) ("[f]or a breach of fiduciary duty involving fraud or concealment, the three year exception for actual knowledge does not apply, and a party has six years from the time it discovers the breach to bring an action").

Although we have yet to address this issue squarely, we have implicitly rejected the district court's interpretation in dictum. *See Gluck*, 960 F.2d at 1177 n.5 ("Although not implicated here, we note that the six-year limitation period of [§ 413(1)] does not protect defendants in instances involving concealment or fraud."). We now join our sister courts and hold that § 413's "fraud and concealment" language applies the federal common law discovery rule to ERISA breach of fiduciary duty claims. In other words, when a lawsuit has been delayed because the defendant itself has taken steps to hide its breach of fiduciary duty, *see Barker*, 64 F.3d at 1402, the limitations period will run

six years after the date of the claim's discovery. The relevant question is therefore not whether the complaint "sounds in concealment," but rather whether there is evidence that the defendant took affirmative steps to hide its breach of fiduciary duty.

Turning to the case at bar, we find nothing suggesting that fraud or concealment delayed the discovery of the breach of fiduciary duty claim. Serious consideration began on May 28, 1987. The plan was announced one month later on July 2, 1987. Although again eschewing a bright-line rule, we suggest that this relatively brief period exemplifies the type of timely notification that companies should give their employees. By publicly announcing its decision on July 2, 1987, PECo foreclosed any suggestion that it attempted to conceal its plans or engaged in a campaign of fraud to prevent the plaintiff class from suing for the alleged breach. The claim, such as it was, lay bare for the world to see. The federal discovery rule, and hence the six year fraud or concealment limitation period, does not apply.[5]

We therefore hold that § 413's statute of limitations bars the fiduciary duty claims of those members of the plaintiff class who asked about a change in pension benefits and retired after May 28 but before July 2, 1987. Given our disposition of the claims of class members who asked about benefits and retired before May 28, we will enter judgment for PECo on the entire class's breach of fiduciary duty claim.

Our treatment of the breach of fiduciary duty claim leaves the plaintiff class with two theories of recovery, discriminatory treatment under ERISA § 510, 29 U.S.C. § 1140, and equitable estoppel. Neither theory has merit. We reject the class's § 510 claim for the reasons announced in *Fischer II*, ___ F.3d at ___ [typescript at 26-27].[6] As to the

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5. Because no fraud or concealment of any kind occurred, we need not address whether § 413's six year period extends to both "self-concealing wrongs" as well as "active concealment" separate from the underlying wrongdoing. *See J. Geils Band*, 76 F.3d at 1253 n.9. The wrong here was neither self-concealing nor actively concealed.

6. This holding gains additional importance because the plaintiff class has advanced its § 510 claim on appeal as an alternative basis for

equitable estoppel claim, our reasoning in *Fischer II* is equally controlling for those members who retired before May 28, 1987. PECo correctly informed these class members that no pension increase was under serious consideration. As a result, these class members cannot establish the first element of an estoppel claim, material misrepresentation. *See Curcio v. John Hancock Mut. Life Ins. Co.*, 33 F.3d 226, 235 (3d Cir. 1994) (listing elements of equitable estoppel claim under ERISA); *Fischer II*, ___ F.3d at ___ [typescript at 25]. We also reject the equitable estoppel claim of the post-May 28 class members. These plaintiffs have failed to establish the third ERISA estoppel element, extraordinary circumstances. *See Curcio*, 33 F.3d at 235.

We have never clearly defined "extraordinary circumstances," relying instead on case law to establish its parameters. *Id.* A review of our precedents indicates that extraordinary circumstances do not exist in this case. To support this element, we have previously required a showing of affirmative acts of fraud or similarly inequitable conduct by an employer. *See Rosen v. Hotel & Restaurant Employees & Bartenders Union*, 637 F.2d 592, 598 (3d Cir. 1981) (holding that pension fund could not deny benefits to participant on grounds that participant's employer failed to pay required contributions where fund administrator allowed employee to pay contributions himself), *cert. denied*, 454 U.S. 898 (1981); *see also Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1165 n.10 (3d Cir. 1990) (citing *Rosen*). Elsewhere, we have focused on the network of misrepresentations that arises over an extended course of dealing between parties. *See Curcio*, 33 F.3d at 238 (finding extraordinary circumstances where insurer misrepresented type of coverage available, informed patient that certain coverage would be provided, then disclaimed coverage); *Smith v. Hartford Ins. Group*, 6 F.3d 131, 142 (3d Cir. 1993) (suggesting extraordinary circumstances might

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avoiding a statute of limitations defense. *See Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir.) (applying to § 510 six year statute of limitations applicable to analogous Pennsylvania employment discrimination claims), *cert. denied*, 484 U.S. 979 (1987). Because the § 510 claim fails as a matter of law, this argument is unavailable.

exist where plaintiff repeatedly and diligently inquired about benefits and defendant repeatedly misrepresented scope of coverage to plaintiff). We have also cited the vulnerability of particular plaintiffs. *See Curcio*, 33 F.3d at 238 (hospital patient denied coverage for substantial claim after hospital represented that coverage would exist); *Smith*, 6 F.3d at 142 (same); *but see Gridley v. Cleveland Pneumatic Co.*, 924 F.2d 1310, 1319 (3d Cir.) (rejecting estoppel where widow of terminal cancer victim sought increased life insurance benefits), *cert. denied*, 501 U.S. 1232 (1991).

These cases demonstrate that a plaintiff must do more than merely make out the "ordinary elements" of equitable estoppel to establish a claim for equitable estoppel under ERISA. *Gillis v. Hoechst Celanese Corp.*, 4 F.3d 1137, 1142 (3d Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1540 (1994); *Gridley*, 924 F.2d at 1319. Because of these heightened requirements, we have consistently rejected estoppel claims based on simple ERISA reporting errors or disclosure violations, such as a variation between a plan summary and the plan itself, or an omission in the disclosure documents. *See Gillis*, 4 F.3d at 1142 (denying recovery where plaintiffs claimed plan documents failed to disclose that severance pay would not be provided to employees who continued working for purchaser of corporate division); *Gridley*, 924 F.2d at 1319 (denying recovery despite omission from disclosure documents of requirement that employee be "actively at work" to qualify for increased life insurance benefits; employee was later denied increased benefits based on requirement).

Applying these principles to the current case, we find nothing to suggest that extraordinary circumstances exist. At best, plaintiffs have established the basic elements of an estoppel claim. There is no conduct suggesting that PECo sought to profit at the expense of its employees, no showing of repeated misrepresentations over time, no suggestion that plaintiffs are particularly vulnerable. In addition, we note that the district court made no finding of extraordinary circumstances. *See District Ct. Op.* at 20, 24. The plaintiffs seem to have ignored the issue, despite the fact that they bear the burden of proof on each estoppel element. *See*

Gillis, 4 F.3d at 1142. We therefore hold that extraordinary circumstances do not exist on the facts of this case, and we will enter judgment for the defendant on the post-May 28 class members' equitable estoppel claim.

III.

The plaintiff class has failed to establish a valid claim for breach of fiduciary duty. Those class members who retired prior to May 28, 1987, did not receive material misinformation about a benefits change because no pension increase was then under serious consideration. The claims of the remaining class members are barred by the applicable statute of limitations. The class's equitable estoppel claim and ERISA § 510 claim also fail. We will therefore reverse the district court's judgment and enter judgment for defendant PECo.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Filed October 1, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 95-1795 and 95-1796

DONALD R. KURZ; WILLIAM ANDERSON; JAMES E.W. BECK; WILLIAM T. BERGEN; CHARLES W. BOWDEN; WILLIAM H. BROWN; RICHARD CAHILL; ARMANDO L. CAPOFERRI; ROBERT C. DEMARCO; JAMES J. DILOLLE, SR.; VINCENT J. DIMAGGIO; JOHN J. DIVALENTINO, JR.; WILLIAM E. DRUMEL; VICTOR J. GIBIALANTE; FRANCIS T. GOLDEN; JAMES J. GRANGER; ELMER D. GREIM, JR.; JAMES H. HAIR; JOHN M. HOOPES; BENJAMIN J. KILIAN; GEORGE C. LINTHICUM; HUBERT A. MCKOWN, JR.; HENRY P. MCNAMEE; OLIVER K. MESSNER; ROBERT E. MILLER; JOHN A. MORSE; SAMUEL J. MULLEN; JOHN A. MUNLEY; STANLEY B. MYERS; JOHN J. NUSSPICKEL; JAMES W. PATTERSON; ALFRED B. SCHUMANN; JOSEPH C. SHARKEY; WILLIAM H. SMOYER; WOODROW E. SNYDER; JAMES D. SUTLIFF; EDWARD J. VETNER; DOMINIC C. VIGLIANESE; G. EARLE WATT; FREDERICK W. WINTERLING; JOHN R. YOUNG

v.

PHILADELPHIA ELECTRIC COMPANY; SERVICE ANNUITY PLAN OF PHILADELPHIA ELECTRIC COMPANY; CHARLES L. FRITZ; J.L. EVERETT, III; JOHN H. AUSTIN, JR.

JOHN J. DIVALENTINO, JR.; WILLIAM E. DRUMEL; JOHN A. MORSE; SAMUEL J. MULLEN; STANLEY B. MYERS; DOMINIC C. VIGLIANESE; JAMES J. DILOLLE; BENJAMIN J. KILIAN; CHARLES W. BOWDEN; ELMER D. GREIM, JR.; FREDERICK W. WINTERLING; JAMES W. BECK; JAMES H. HAIR; ROBERT C. DEMARCO; ALFRED G. SCHUMANN; RICHARD CAHILL; JAMES W. PATTERSON; JOHN M. HOOPES; HUBERT A. MCKOWN, JR.; ROBERT E. MILLER; JAMES D. SUTLIFF; HENRY P. MCNAMEE; FRANCIS T. GOLDEN; WILLIAM T. BERGEN; GEORGE C. LINTHICUM; WILLIAM W. ANDERSON; JOHN R. YOUNG; VINCENT J. DIMAGGIO; SHIELDS L. DALTROFF; RICHARD O. FOLKMAN; ALFRED E. STAVOLA; ROBERT H.C. LESS; SAMUEL E. BELL; DONALD F. WASHINGTON; FRANK J. GALLAGHER; MAURICE M. PEITZMAN; HARRY G. TURNER, JR.; ROBERT I. FRIEND; DONALD C. ROBINSON; WILLIAM J. LEAMAN, JR.; AUGUSTUS W. O'MALLEY; DALLAS S. SCOTT, JR.; JOHN S. STILLWAGON; ROBERT C. HECKESSER; WILLIAM R. TRAVETTI; WILLIAM B. HORLOCK; JAMES STATES; THOMAS W. RAYER; JOHN H. VONRHINE; WALTER ALLWOERDEN; GEORGE C. WIEDERSUM, JR.; JAMES R. MCCARRON; SALVATOR J. DESTEFANO; JOHN C. GARVIN; A. WILLIAM LANCASTER; JOSEPH A. FOCHT; ROBERT MITCHELL; JOSEPH P. SUBRANNI; JOHN F. CRAWFORD; WILLIAM G. TAYLOR; KENNETH R. SEDGLEY, JR.; IRWIN G. BLACKBURN; CHARLES R. CAREY; JOHN R. YOUNG; JESSEE E. GRAY, JR.; JAMES D. DERSTINE; ALLEN H. BRAID; PAUL L. THOMAS; STEPHEN MICKLOSH, JR.; WILLIAM L. GIBBONS; RUSSELL B. MURRAY; ROLAND J. MARKUN; ERNEST W. BEAM; RAYMOND W. SCHOLL, JR.; JOHN F. PARKER; JOSEPH F. MCBRIDE; VINCENT S. BOYER; MARTIN M. MORGAN and DAVID MONZO,

Appellants in 95-1795

DONALD R. KURZ; WILLIAM ANDERSON; JAMES E.W. BECK; WILLIAM T. BERGEN; CHARLES W. BOWDEN; WILLIAM H. BROWN; RICHARD CAHILL; ARMANDO L. CAPOFERRI; ROBERT C. DEMARCO; JAMES J. DILOLLE, SR.; VINCENT J. DIMAGGIO; JOHN J. DIVALENTINO, JR.; WILLIAM E. DRUMEL; VICTOR J. GIBIALANTE; FRANCIS T. GOLDEN; JAMES J. GRANGER; ELMER D. GREIM, JR.; JAMES H. HAIR; JOHN M. HOOPES; BENJAMIN J. KILIAN; GEORGE C. LINTHICUM; HUBERT A. MCKOWN, JR.; HENRY P. MCNAMEE; OLIVER K. MESSNER; ROBERT E. MILLER; JOHN A. MORSE; SAMUEL J. MULLEN; JOHN A. MUNLEY; STANLEY B. MYERS; JOHN J. NUSSPICKEL; JAMES W. PATTERSON; ALFRED B. SCHUMANN; JOSEPH C. SHARKEY; WILLIAM H. SMOYER; WOODROW E. SNYDER; JAMES D. SUTLIFF; EDWARD J. VETNER; DOMINIC C. VIGLIANESE; G. EARLE WATT; FREDERICK W. WINTERLING; JOHN R. YOUNG

v.

PHILADELPHIA ELECTRIC COMPANY; SERVICE ANNUITY PLAN OF PHILADELPHIA ELECTRIC COMPANY; CHARLES L. FRITZ; J.L. EVERETT, III; JOHN H. AUSTIN, JR.

Peco Energy Company, formerly Known as Philadelphia Electric Company, Service Annuity Plan of Philadelphia Electric Company, Charles L. Fritz, J.L. Everett, III and John H. Austin, Jr.

Appellants in 95-1796.

On Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civil Action No. 91-cv-02771)

Argued April 29, 1996

Before: COWEN and ROTH, *Circuit Judges* and CINDRICH,[1] *District Judge*

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1. Honorable Robert J. Cindrich, United States District Court Judge for the Western District of Pennsylvania, sitting by designation.

ORDER AMENDING SLIP OPINION

IT IS ORDERED that the slip opinion in the above case, filed on October 1, 1996, be amended as follows:

On page 5, line 13, add an "s" to the word "defendant" and delete the name "PECo".

On page 18, Section III, delete the last sentence and replace it with the following sentence:

> We will therefore reverse the district court's judgment and enter judgment on behalf of all defendants.

By the Court,

/s/ Jane R. Roth
Circuit Judge

Dated: October 1, 1996

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Filed October 1, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 95-1793 and 95-1794

HERBERT L. FISCHER; FLOYD L. ADAMS; JAMES W. ALFREDS; JOHN I. ARENA; EARL T. ATKINSON; WILLIAM AUVE; THOMAS F. BECK; WILLIAM J. BONO; WILLIAM A. BURWELL, JR., JOSEPH C. CALABRESE; PETER CARFAGNO; JOHN B. CREIGHTON; RALPH J. DAFERMO, SR.; FELIX A. DEJOSEPH; JOSEPH A. DEVITO; JOHN T. DOUGHERTY; JOHN J. DOWLING; ANTHONY FALASCA; EUGENE FINK; RITA J. GESUALDO; EDWIN HAINES; JOSEPH T. HALEY; DANIEL J. HEFFERAN; LEO M. HILL; ROBERT J. HOOPES; DONALD J. HOY; MICHAEL HRYNKO; DONALD HUGHES; CARL M. HUNSICKER; NEAL IRELAND; WALTER D. KRAUS; CHARLES E. LINDEMUTH; ROBERT F. MAHONEY; ANTHONY D. MARCHESANI; ROBERT P.F. MCCARON; ROBERT MCCORMICK; FRANK L. MERCADANTE; JOHN P. MONAGHAN; DAVID MONZO; JOHN K. MOORE; JOSEPH P. MORAN; MILDRED PEARL MORGAN; RALPH E. MOYER; HERBERT E. MUELLER; JAMES J. NUGENT; THOMAS E. OETZEL; FRANK W. PERSICHETTI, SR.; CHARLES W. PLUMMER; LEWIS RAIBLEY; JAMES J. RODDY; JOHN J. SAUNDERS; LOUIS F. SAUNDERS; NICHOLAS J. SCRENCI; JOSEPH J. SEMETTI; JOHN STEINDL; WILLIAM F. THOMPSON; MICHAEL W. TRENDLER; FRANCIS R. TUNNEY, SR.; HERBERT R. WALTERS; RICHARD S. WILSON; JOHN H. ZIMMER; GERALD A. ZIMMERMAN

v.

PHILADELPHIA ELECTRIC COMPANY; JOSEPH F. PAQUETTE, JR.; MICHAEL J. CROMMIE; SERVICE ANNUITY PLAN OF PHILADELPHIA ELECTRIC COMPANY

HERBERT L. FISCHER, JOHN B. CREIGHTON, FRANCIS R. TUNNEY, SR.; EARL ATKINSON, LEO M. HILL, DONALD HUGHES; JOSEPH P. MORAN; MICHAEL W. TRENDLER; JOHN H. ZIMMER; WILLIAM AUVE; JOHN STEINDL; LOUIS F. SAUNDERS; ROBERT MCCORMICK; WILLIAM J. BONO; JAMES J. RODDY; RITA J. GESUALDO; RALPH J. DAFERMO, SR.; JOSEPH C. CALABRESE; JAMES W. ALFREDS; FELIX A. DEJOSEPH; EUGENE FINK; JOSEPH T. HALEY; WALTER D. KRAUS; CHARLES W. PLUMMER; ROBERT P.F.MCCARRON; RICHARD S. WILSON; JOHN P. MONAGHAN, RALPH E. MOYER; JOHN J. DOWLING; JOSEPH J. SEMETTI; CHARLES E. LINDEMUTH; ROBERT F. MAHONEY; JOHN K. MOORE; JAMES J. NUGENT; JOHN J. SAUNDERS; ANTHONY FALASCA; DANIEL J. HEFFEREN; NICHOLAS J. SCRENCI; THOMAS E. OETZEL; DONALD J. HOY; FLOYD L. ADAMS, THOMAS F. BECK; JOHN T. DOUGHERTY; WILLIAM F. THOMPSON; GERALD A. ZIMMERMAN; HERBERT E. MUELLER; HERBERT R. WALTERS; LEWIS RAIBLEY; JOSEPH L. GIORGIO; JOSEPH DEVITO; DAVID MONZO; THOMAS J. LEE; THOMAS B. BARNES, JR.; PHILIP G. MULLIGAN; ROBERT L. TOMLINSON; JOHN R. GRIMES; W.B. WILLSEY; WILLIAM J. MOSS; JAMES T. PRYOR; ROBERT J. GLENN; GEORGE C. ZAPP; JOSEPH J. DELLA VECCHIO; GEORGE V. CHURACH; CHARLES T. REIMEL; ANDREW J. KELLEHER; GEORGE C. HALL; WILLIAM P. ZACKEY; FRANCIS W. BATIPPS; HARRY C. FRYMIARE, JR.; JOSEPH J. GRECO; RICHARD R. ROWLANDS; JESSE P. BOYD; JAMES D. DENNETT; VERNON C. READMAN, JR.; JOSEPH L. GIORGIO; EDWARD M. HAILE; EUGENE C. SCHINDLER; JOHN P. SWAHL; ELMER E. LUCAS; JAMES L. ROUSH; JAMES V. LEWIS; ALBERT J. RIEGER; THOMAS J. SHERIDAN, JR.; DOLORES A. ROMANO; HELEN J. THROCKMORTON; ROBERT E. SPROSS; WILLIAM P. ROHLFING; EDWARD C. KISTNER, JR.; HARRY W. BACKHOUSE; JAMES V. MANNION, JR.; JOSEPH E. BONAPARTE; WILLIAM A. BRADY, JR.; MALCOLM J. MACNEIL; MANUS J. COONEY; JOHN J. KUHNS; MARLENE BELL; DEAN G. BRADFORD; JAMES W. BATEMAN; JAMES S. HERRICK;

STANLEY W. JACQUES, JR.; RUDOLPH G. DELLA VECCHIO; ALDEN F. TUCKER & BERNARD J. DRESS,

Appellants in 95-1793

HERBERT L. FISCHER; FLOYD L. ADAMS; JAMES W. ALFREDS; JOHN I. ARENA; EARL T. ATKINSON; WILLIAM AUVE; THOMAS F. BECK; WILLIAM J. BONO; WILLIAM A. BURWELL, JR.; JOSEPH C. CALABRESE; PETER CARFAGNO; JOHN B. CREIGHTON; RALPH J. DAFERMO, SR.; FELIX A. DEJOSEPH; JOSEPH A. DEVITO; JOHN T. DOUGHERTY; JOHN J. DOWLING; ANTHONY FALASCA; EUGENE FINK; RITA J. GESUALDO; EDWIN HAINES; JOSEPH T. HALEY; DANIEL J. HEFFERAN; LEO M. HILL; ROBERT J. HOOPES; DONALD J. HOY; MICHAEL HRYNKO; DONALD HUGHES; CARL M. HUNSICKER; NEAL IRELAND; WALTER D. KRAUS; CHARLES E. LINDEMUTH; ROBERT F. MAHONEY; ANTHONY D. MARCHESANI; ROBERT P.F. MCCARRON; ROBERT MCCORMICK; FRANK L. MERCANDANTE; JOHN P. MONAGHAN; DAVID MONZO; JOHN K. MOORE; JOSEPH P. MORAN; MILDRED PEARL MORGAN; RALPH E. MOYER; HERBERT E. MUELLER; JAMES J. NUGENT; THOMAS E. OETZEL; FRANK W. PERSICHETTI, SR.; CHARLES W. PLUMMER; LEWIS RAIBLEY; JAMES J. RODDY; JOHN J. SAUNDERS; LOUIS F. SAUNDERS; NICHOLAS J. SCRENCI; JOSEPH J. SEMETTI; JOHN STEINDL; WILLIAM F. THOMPSON; MICHAEL W. TRENDLER; FRANCIS R. TUNNEY, SR.; HERBERT R. WALTERS; RICHARD S. WILSON; JOHN H. ZIMMER; GERALD A. ZIMMERMAN

v.

PHILADELPHIA ELECTRIC COMPANY; JOSEPH F. PAQUETTE, JR.; MICHAEL J. CROMMIE; SERVICE ANNUITY PLAN OF PHILADELPHIA ELECTRIC COMPANY

PECo Energy Company, formerly known as Philadelphia Electric Company, Joseph F. Paquette, Jr., Michael J. Crommie and Service Annuity Plan of Philadelphia Electric Company,

Appellants in 95-1794

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 90-cv-08020)

Argued April 29, 1996

Before: COWEN and ROTH, *Circuit Judges* and
CINDRICH[1], *District Judge*

(Opinion filed October 1, 1996)

Ronald L. Wolf, Esq.
Martina W. McLaughlin, Esq.
(Argued)
Litvin, Blumberg, Matusow & Young
1339 Chestnut Street
The Widener Building, 18th Floor
Philadelphia, PA 19107

Attorneys for Appellants in
95-1793 and Cross-Appellees in
95-1794

David H. Marion, Esq.
(Argued in 95-1793 & 1794)
Howard J. Bashman, Esq.
Montgomery, McCracken, Walker &
Rhoads
Three Parkway, 20th Floor
Philadelphia, PA 19102

Attorneys for PECo Energy Co.,
f/k/a Philadelphia Electric Co.;
Joseph F. Paquette, Jr.; Michael J.
Crommie; and Service Annuity
Plan of Philadelphia Electric
Company Appellees in 95-1793
and Cross-Appellants in 95-1794

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1. Honorable Robert J. Cindrich, United States District Court Judge for the Western District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

ROTH, *Circuit Judge*:

In this appeal, we must review the application of a decision we reached when this case first came before us. In *Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130 (3d Cir.) ("*Fischer I*"), *cert. denied*, 510 U.S. 1020 (1993), we reversed the district court's grant of summary judgment to defendant Philadelphia Electric Co. ("PECo"), holding that there were genuine issues of material fact as to whether PECo, acting in its role as fiduciary under the Employee Retirement Income Security Act ("ERISA"), had made affirmative material misrepresentations to its employee-beneficiaries. The misrepresentations alleged were that PECo had denied, or failed to disclose when asked, that it was seriously considering an early retirement program. We remanded the case to the district court to determine when PECo began to give serious consideration to an early retirement program. *Id.* at 135.

On remand, the district court concluded that PECo was seriously considering an early retirement program as of March 12, 1990. *Fischer v. Philadelphia Elec. Co.*, C.A. No. 90-8020, slip op. at 19 (E.D. Pa. May 16, 1994) ("*District Ct. Op.*"). Applying *Fischer I*, the district court held that any employee who sought information about retirement benefits during the period from March 12, 1990, until the announcement of the plan on April 19, 1990, and who was told that no change was under consideration, had received material misinformation.

We find that the district court misunderstood the concept of "serious consideration." We will therefore reverse the decision of the district court, and we will enter judgment for defendant.

I.

This action arises out of PECo's efforts to cut costs and reduce its payroll by implementing an early retirement plan. On April 19, 1990, Joseph Paquette, PECo's President

and Chief Operating Officer, announced in a letter to all employees that he would recommend to PECo's Board of Directors that the company cut its payroll through early retirement. On April 26, 1990, PECo sent a letter to all employees who had announced an intent to retire, suggesting that they delay their retirement until the company's early retirement package was finalized. On May 25, 1990, PECo's Board of Directors approved a plan, which included inducements such as a five year time-in-service credit, a five year age credit, and severance pay. These events caused much consternation among employees who had retired in the months preceding the plan's announcement.

Various pre-plan retirees filed suit in the U.S. District Court for the Eastern District of Pennsylvania, alleging that PECo had long known of its intent to offer an early retirement package, or at least that it was considering a package, and had breached its fiduciary duty under ERISA § 404, 29 U.S.C. § 1104, by providing material misinformation. The district court certified a class, then entered summary judgment for PECo. In *Fischer I*, we reversed, holding that PECo could be liable for breach of fiduciary duty if the company represented that no early retirement plan was being considered at a time when the plan was in fact under serious consideration. 944 F.2d at 133. We remanded for a trial on the merits; a bench trial followed. The facts we recite here were found by the district court; the vast majority were stipulated.

PECo had long engaged in a practice of reviewing its retirement and pension benefits packages as part of its ordinary course of business. During one such review, on March 21, 1988, Fred Beaver, an Administrative Assistant in the Benefits Division of Human Resources, prepared a memorandum for Charles Fritz, Vice President of Personnel and Industry Relations, on the possibility of reducing the size of PECo's work force. The memorandum suggested that a modest "sweetener" could induce approximately 50% of a target group of workers to retire. During the same period, on May 5, 1988, Michael Crommie, PECo's Director of Benefits, contacted William Murdoch, a consultant with Towers, Perrin, Forster & Crosby ("TPF&C"), to discuss

various early retirement options. Discussions between management and TPF&C continued into June.

Beaver's memorandum and the TPF&C consultations occurred roughly contemporaneously with Joseph Paquette's arrival at PECo as president and chief of operations. Paquette had a long term goal of reducing the number of PECo employees, and he would ultimately recommend the 1990 early retirement package. In June, 1988, however, Paquette decided against an early retirement plan. At trial, Paquette testified that PECo was then in the process of completing one nuclear plant and restarting another. He did not want to risk an early retirement program because personnel vital to the nuclear effort might leave. He believed that PECo could not legally institute an early retirement plan that excluded nuclear plant personnel. After deciding that no early retirement package would be considered, Paquette shifted his attention to promoting operational excellence at the company.

In July, 1989, PECo requested a rate increase from the Public Utility Commission ("PUC"). PUC staff made a preliminary recommendation that PECo be granted less than half its requested increase.

In November, 1989, as part of the operational excellence program, PECo hired McKinsey & Co. to explore long-term strategies and cost-cutting measures. Paquette used the McKinsey report to calculate the savings that an early retirement program could produce.

On December 13, 1989, Paquette held three meetings with employees to discuss the importance of the rate increase to the company. In response to questions, Paquette stated that an early retirement plan might be considered if the rate request was denied. He explained that the company had no plans for such a program because the outcome of the rate increase was in doubt. Paquette stated that PECo's first option in the event the increase was denied would be to appeal the decision but that the company would also consider cutting costs and reducing its stock dividend. On March 1, 1990, an Administrative Law Judge issued an interim decision recommending that PECo receive 21% of the rate increase it had requested.

Events accelerated rapidly following the ALJ's decision. On March 12, 1990, Kenneth Lefkowitz, Manager of Compensation & Benefits, contacted Murdoch at TPF&C. Lefkowitz stated PECo's concern about its rate case before the PUC and the need to reduce costs quickly. The question of an early retirement sweetener was mentioned as a possible method. TPF&C had done no work for PECo on early retirement plans since June, 1988, nor had TPF&C been asked to prepare contingency plans in case PECo's rate request was denied. On March 20, 1990, Lefkowitz asked TPF&C to develop a set of early retirement alternatives. On March 28, 1990, Murdoch proposed three alternative programs, the first of which resembled the 1988 program in some respects, although it targeted a different group of eligible employees and contained different severance provisions. On April 2, 5, and 6, Murdoch had further discussions with PECo personnel about the details of the early retirement sweetener. On April 7, senior PECo executives attended a corporate strategy meeting. Notes from the meeting indicated a statement by Paquette that on April 20 he would issue a letter announcing a $100 million cost cutting program. On April 13, 1990, TPF&C provided PECo with a survey of early retirement plans used by other utilities. On April 19, 1990, the PUC granted less than 50% of PECo's rate request. Paquette then sent the letter to PECo employees announcing his intent to recommend an early retirement package.

Based on these findings, the district court held that PECo began seriously considering an early retirement plan on March 12, 1990. The district court entered judgment for those retirees who asked about an early retirement plan and retired after March 12. It entered judgment for PECo on the claims of those retirees who asked about retirement and retired before that date. Both PECo and the plaintiff class appealed. The plaintiff class appeals the district courts determination that serious consideration of the early retirement plan did not begin before March 12, 1990. PECo, on the other hand, asserts that serious consideration did not begin until after March 12, 1990.[2]

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2. PECo also appealed the certification of the plaintiff class and subclasses. In view of our determination of the date upon which serious consideration began, we do not need to resolve this issue.

II.

Our analysis proceeds within the confines of *Fischer I*. In that decision, we established the general rule that governs interactions between a company-as-fiduciary and its employee-beneficiaries regarding changes in benefits: "A plan administrator may not make affirmative material misrepresentations to plan participants about changes to an employee pension benefits plan. Put simply, when a plan administrator speaks, it must speak truthfully." 994 F.2d at 135. This overarching duty of truthfulness forms an important part of our ERISA jurisprudence. *See In re Unisys Corp. Retiree Medical Benefit "ERISA" Litig.*, 57 F.3d 1255, 1266-67 (3d Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1316 (1996); *Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1302-03 (3d Cir. 1994).

The rule of truthfulness that we announced in *Fischer I* focused on the materiality of a plan administrator's misrepresentations. We defined materiality as a mixed question of law and fact, ultimately turning on whether "there is a substantial likelihood that [the misrepresentation] would mislead a reasonable employee in making an adequately informed decision about if and when to retire." *Id.* at 135. We further explained that

> [i]ncluded within the overall materiality inquiry will be an inquiry into the seriousness with which a particular change to an employee pension plan is being considered at the time the misrepresentation is made. All else equal, the more seriously a plan change is being considered, the more likely a misrepresentation, e.g., that no change is under consideration, will pass the threshold of materiality.

Id.

In the current case, as in any case where the misrepresentation in question is the statement that no change in benefits is under consideration, the only factor at issue is the degree of seriousness with which the change was in fact being considered. This factor controls the materiality test: "[T]he more seriously a plan change is being considered, the more likely a misrepresentation . . .

will pass the threshold of materiality." *Id.* Serious consideration forms the crux of the inquiry. *See Kurz v. Philadelphia Elec. Co.*, 994 F.2d 136, 140 (3d Cir.) ("*Kurz I*") ("PECo is entitled to argue . . . that the statements it allegedly made were not material because at the time those statements were made, the amendment to the plan was not under serious consideration"), *cert. denied*, 510 U.S. 1020 (1993); *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163-64 (6th Cir. 1988) ("when serious consideration was given to implementing [improved benefits, the company] had a fiduciary duty not to make misrepresentations, either negligently or intentionally, to potential plan participants concerning the [change]"); *see also Maez v. Mountain States Tel. & Tel., Inc.*, 54 F.3d 1488, 1501 (10th Cir. 1995) (holding allegation of company's denial of early retirement plan when plan was under serious consideration sufficient to state claim for breach of fiduciary duty); *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 669 (2d Cir. 1994) (same, following *Fischer I*); *cf. Vartanian v. Monsanto Co.*, 14 F.3d 697, 702 (1st Cir. 1994) (holding plaintiff had standing to assert claim for company's misrepresentations when retirement plan was under serious consideration); *Barnes v. Lacy*, 927 F.2d 539, 544 (11th Cir.) (noting that if a company "after serious consideration of a second [plan]" represented that no change was being considered, "such a representation would be characterized as a material misrepresentation"), *cert. denied*, 502 U.S. 938 (1991).

Although the test we set out in *Fischer I* ultimately turned on "serious consideration," we paid little attention to the details of that term. We offered nothing in the way of a definition, standard, or even factors to consider. We simply remanded the case to the district court, leaving to the district judge the task of determining when PECo's consideration became serious. We commend his efforts to apply this amorphous concept. We will now provide further guidance on the meaning of "serious consideration."

The concept of "serious consideration" recognizes and moderates the tension between an employee's right to information and an employer's need to operate on a day-to-day basis. Every business must develop strategies, gather information, evaluate options, and make decisions. Full

disclosure of each step in this process is a practical impossibility. Moreover, as counsel for PECo emphasized at oral argument, large corporations regularly review their benefit packages as part of an on-going process of cost-monitoring and personnel management. The various levels of management are constantly considering changes in corporate benefit plans. A corporation could not function if ERISA required complete disclosure of every facet of these on-going activities. Consequently, our holding in *Fischer I* requires disclosure only when a change in benefits comes under *serious* consideration.

Equally importantly, serious consideration protects employees. Every employee has a need for material information on which that employee can rely in making employment decisions. Too low a standard could result in an avalanche of notices and disclosures. For employees at a company like PECo, which regularly reviews its benefits plans, truly material information could easily be missed if the flow of information was too great. The warning that a change in benefits was under serious consideration would become meaningless if cried too often.

We demonstrated our awareness of these competing policies in *Fischer I*. Although our decision was clearly driven by an employee's need for truthful information, we nevertheless recognized a concomitant "right [of] an employer to make the business decision of how much and when to enhance pension benefits." 994 F.2d at 133. Later in the opinion, we expressed similar sentiments, cautioning that

> ERISA does not impose a duty of clairvoyance on fiduciaries. An ERISA fiduciary is under no obligation to offer precise predictions about future changes to its plan. Rather, its obligation is to answer participants' questions forthrightly, a duty that does not require the fiduciary to disclose its internal deliberations nor interfere with the substantive aspects of the collective bargaining process.

Id. at 135 (citations omitted). Other courts of appeals have likewise emphasized the absence of any "duty of clairvoyance," as well as the fact that disclosure does not

extend to internal deliberations. *See Swinney v. General Motors Corp.*, 46 F.3d 512, 520 (6th Cir. 1995); *Mullins*, 23 F.3d at 669; *Drennan v. General Motors Corp.*, 977 F.2d 246, 251 (6th Cir. 1992), *cert. denied*, 508 U.S. 940 (1993); *Barnes* 927 F.2d at 544; *Berlin*, 858 F.2d at 1164.

In light of these concerns, we believe that the following formulation of serious consideration is appropriate: Serious consideration of a change in plan benefits exists when (1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement the change. We draw this formulation primarily from the excellent opinions of Judge Weiner in the current case, *see District Ct. Op.* at 17, and Judge Katz in *Zschunke v. Bell Atlantic Corp.*, 872 F. Supp. 1395, 1401 (E.D. Pa. 1995), *aff'd*, 70 F.3d 1259 (3d Cir. 1995). Consistent with our decision in *Fischer I*'s companion case, this formulation does not turn on any single factor; the determination is inherently fact-specific. *Kurz I*, 994 F.2d at 139. Likewise, the factors themselves are not isolated criteria; the three interact and coalesce to form a composite picture of serious consideration. For purposes of discussion, we address each in turn.

The first element, a specific proposal, distinguishes serious consideration from the antecedent steps of gathering information, developing strategies, and analyzing options. A company must necessarily go through these preliminary steps before its deliberations can reach the serious stage. This factor does not mean, however, that the proposal must describe the plan in its final form. A specific proposal can contain several alternatives, and the plan as finally implemented may differ somewhat from the proposal. What is required, consistent with the overall test, is a specific proposal that is sufficiently concrete to support consideration by senior management for the purpose of implementation.

The second element, discussion for implementation, further distinguishes serious consideration from the preliminary steps of gathering data and formulating strategy. It also protects the ability of senior management to take a role in the early phases of the process without automatically triggering a duty of disclosure. This factor

recognizes that a corporate executive can order an analysis of benefits alternatives or commission a comparative study without seriously considering implementing a change in benefits. Preliminary stages may also require interaction among upper level management, company personnel, and outside consultants. These discussions are properly assigned to the preliminary stages of company deliberations. Consideration becomes serious when the subject turns to the practicalities of implementation.

The final element, consideration by senior management with the authority to implement the change, ensures that the analysis of serious consideration focuses on the proper actors within the corporate hierarchy. As noted, large corporate entities conduct regular or on-going reviews of their benefit packages in their ordinary course of business. These entities employ individuals, including middle and upper-level management employees, to gather information and conduct reviews. The periodic review process may also entail contacting outside consultants or commissioning studies. During the course of their employment, the employees assigned these tasks necessarily discuss their duties and the results of their studies. These discussions may include issues of implementation. The employees may also make recommendations to upper level management or senior executives. As a general rule, such operations will not constitute serious consideration. These activities are merely the ordinary duties of the employees. Until senior management addresses the issue, the company has not yet seriously considered a change.

Consideration by senior management is also limited to those executives who possess the authority to implement the proposed change. This focus on authority can be used to identify the proper cadre of senior management, but it should not limit serious consideration to deliberations by a quorum of the Board of Directors, typically the only corporate body that in a literal sense has the power to implement changes in benefits packages. It is sufficient for this factor that the plan be considered by those members of senior management with responsibility for the benefits area of the business, and who ultimately will make recommendations to the Board regarding benefits operations.

At the risk of redundancy, we stress that these factors do *not* establish a bright-line rule. In *Kurz I*, we expressly rejected the suggestion that serious consideration could be tied to any single objective event. 994 F.2d at 139. Our decision today, which merely elaborates on *Fischer I* and *Kurz I*, contrasts markedly with a true bright-line rule, such as that recently adopted by the Court of Appeals for the Second Circuit. *Compare Pocchia v. NYNEX Corp.*, 81 F.3d 275, 278 (2d Cir. 1996) (adopting bright-line rule where employee fails to request information about changes in benefits, finding no duty to disclose changes until new plan goes into effect), *with Mullins v. Pfizer, Inc.*, 23 F.3d 663, 668-69 (2d Cir. 1994) (following *Fischer I* and adopting materiality standard for affirmative misrepresentations). The elements that we have outlined limit serious consideration to the latter stages of corporate decision-making, but they remain flexible and fact-specific.

We believe that our explanation of serious consideration maintains the balance struck in *Fischer I*. Our formulation respects the division of responsibility in corporate entities and the day-to-day realities of running a business. Even more importantly, it protects the right of employees to material information. Characterizing serious consideration in this fashion ensures that disclosures to employees about potential changes in benefits will be meaningful. Employees will learn of potential changes when the company's deliberations have reached a level where an employee should reasonably factor the potential change into an employment decision. This guarantees that employees will have the information they need, while avoiding a surfeit of meaningless disclosures. Finally, as a matter of policy, we note that imposing liability too quickly for failure to disclose a potential early retirement plan could harm employees by deterring employers from resorting to such plans. *See Pocchia*, 81 F.3d at 279 ("If fiduciaries were required to disclose such a business strategy, it would necessarily fail. Employees simply would not leave if they were informed that improved benefits were planned if workforce reductions were insufficient."); *cf. Swinney*, 46 F.3d at 520 ("Changing circumstances, such as the need to reduce labor costs, might require an employer to sweeten its severance package, and an employer should not be forever deterred

from giving its employees a better deal merely because it did not clearly indicate to a previous employee that a better deal might one day be proposed."). Our formulation avoids forcing companies into layoffs, the primary alternative to retirement inducements. This further protects the interests of workers.

III.

Having explained our understanding of serious consideration, we now apply it to the case at bar. Although we would ordinarily remand to allow the district court to apply our standard in the first instance, we see no need in the current case. Judge Weiner's thoughtful opinion has set out clearly the necessary factual findings, and we can simply apply the law to reach the requisite conclusion. Based on our three factor test, we find that serious consideration began on April 7, 1990. We will therefore reverse the district court to the extent that it found serious consideration as of March 12, 1990.[3]

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3. We expressly reserve the question of the appropriate standard of review. In *Fischer I*, we described the standard for materiality as a mixed question of law and fact, but we offered little insight into the appropriate apportionment. 994 F.2d at 135. Our discussion linked serious consideration to materiality, indicating that it would be a question of law, subject to plenary review. *Id.* Consistent with this approach, the district court included its determination as part of its "Conclusions of Law." *See District Ct. Op.* at 19. Both parties, by contrast, believe the question is one of fact, reviewed for clear error. The Courts of Appeals for the Eighth Circuit and the Sixth Circuit have declared "serious consideration" an issue of fact. *See Wilson v. Southwestern Bell Tel. Co.*, 55 F.3d 399, 405 (8th Cir. 1995); *Drennan*, 977 F.2d at 251. Their assessments, however, were overly conclusory. Both the *Wilson* and *Drennan* courts simply cited language from the original *Berlin* opinion, but this language speaks more clearly to the summary judgment standard rather than the status of serious consideration. *See Berlin*, 858 F.2d at 1165 ("genuine issues of material fact exist as to . . . when serious consideration . . . took place"). To further add to the confusion, we recently described materiality as an issue of fact in *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 441 (3d Cir.), *petition for cert. filed*, 64 U.S.L.W. 3780 (May 6, 1996). Because we would reverse the district court even on the clearly erroneous standard, we need not explore this issue further.

The district court correctly dismissed events prior to March 12, 1990, as failing to rise to the level of serious consideration. Any potential consideration of an early retirement program prior to June, 1988, was conclusively ended by Paquette's decision to forego an early retirement option and focus on operational excellence. These events had no bearing on the subsequent decision to implement an early retirement plan in August, 1990.

The district court was equally correct to dispose of Paquette's statements during his speeches to employees on December 13, 1989. Paquette responded truthfully to employee questions regarding PECo's potential responses to an adverse decision in the rates case. Paquette explained that PECo would first appeal the decision but might also have to consider cutting costs by reducing its stock dividend or other methods. This is the type of frank response to employee concerns that should be encouraged. Paquette's statements will not support an inference that an early retirement plan was then under serious consideration.

The district court then concluded that PECo began seriously considering a plan sometime between December and April. Citing Lefkowitz's March 12, 1990, telephone call to TPF&C as the earliest example of affirmative action to implement the plan, the district court marked the start of serious consideration on that date. Under our three factor inquiry, this is incorrect.

As we have explained, serious consideration requires (1) a specific proposal (2) discussed for purposes of implementation (3) by senior management with the authority to implement the change. In the case at bar, these three factors did not coincide until April 7, 1990, when senior PECo management met to discuss the TPF&C report on staff reduction options. The TPF&C report is an excellent example of a specific proposal. This document outlined various early retirement alternatives and served as the basis for management's deliberations. Senior management was present at the meeting. The subject of the meeting was corporate strategy, and meeting notes indicate that Paquette disclosed his intent to announce $100 million in cost cuts. Both facts suggest that an early retirement

plan was discussed for purposes of implementation at the April 7 meeting.

Events prior to April 7, by contrast, do not rise to the level of serious consideration. The March 12 Lefkowitz telephone call is clearly insufficient. First, the substance of the March 12 call involved nothing more than a general discussion of early retirement options. Lefkowitz was reestablishing contact on a subject where TPF&C had done no work since 1988. The subject matter of the contact was therefore preliminary. Second, Lefkowitz was a middle management employee in PECo's benefits department. His official duties entailed monitoring PECo's benefits package and exploring potential changes. Nothing in the record indicates that, when Lefkowitz made his March 12 telephone call to TPF&C, he was doing anything more than acting within the scope of his normal duties. This type of action by a middle management employee is preliminary. Third, even if Lefkowitz were acting on orders from senior management, his call to TPF&C would still fall under the rubric of gathering information. Senior management is free to start the process of exploration and evaluation without immediately triggering a duty of disclosure. For each of these reasons, the March 12 phone call took place prior to serious consideration. The district court was therefore incorrect.

The March 20 contact between Lefkowitz and TPF&C confirms this conclusion. It was on March 20 that Lefkowitz asked TPF&C to develop a set of options for staff reduction, including various early retirement plans. This is crucial. Serious consideration can only begin after information is gathered and options developed. The record indicates that the March 20 phone call assigned TPF&C the task of developing options. This contact therefore preceded serious consideration.

Events between March 20 and April 7 can similarly be categorized under preliminary stages such as information gathering and strategy formulation. The record indicates that Murdoch, a partner at TPF&C, met with Lefkowitz and other PECo executives during this period. These meetings are consistent with TPF&C's efforts to develop a report for PECo, the very task it had been assigned on March 20. The

fact that TPF&C submitted its report on April 2 removes any lingering doubt. It was only after April 2 that a specific proposal existed...

Given that TPF&C submitted its report on April 2, the meetings that occurred on April 2, 5, and 6 between Murdoch, Paquette, and other PECo management present a closer question. A proposal had been developed and PECo management was involved in the meetings. However, details of the proposals were still being discussed. On April 7, a corporate strategy meeting was held. Paquette stated at the meeting that he would announce targets and programs on April 20. Based on this clear example of a meeting of senior PECo executives to address the early retirement issue at a time when a specific proposal had been submitted, we conclude that serious consideration began on April 7, 1990.

Under the rule established in *Fischer I*, any employee who asked about a potential early retirement plan after serious consideration began on April 7, 1990, but before the plan's formal announcement on April 19, 1990, received material misinformation. Such an employee would have established a claim for breach of fiduciary duty under ERISA. However, all of the members of the plaintiff class retired before this period.[4] We will, therefore, enter judgment for PECo on the plaintiff's breach of fiduciary duty claim.

IV.

The plaintiff class raised two alternative theories of liability which we will discuss briefly. Neither has merit.

First, the plaintiff class proceeded on an alternative theory of common law estoppel. To establish a claim for equitable estoppel under ERISA, a plaintiff must prove: (1) a material representation, (2) reasonable and detrimental reliance upon the representation, and (3) extraordinary circumstances. *Curcio v. John Hancock Mut. Life Ins. Co.*, 33 F.3d 226, 235 (3d Cir. 1994). We need look no further than the first element. Because no change in the plan was

4. The Fischer class of former PECo employees retired on January 1, 1990, February 1, 1990, March 1, 1990, and April 1, 1990.

under serious consideration at the time the members of the plaintiff class requested information, no material representations were made. The estoppel claim fails.

Second, the plaintiffs argue that PECo engaged in conduct violative of ERISA § 510, 29 U.S.C. § 1140. Section 510 provides:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled . . . or for the purpose of interfering with the attainment of any right to which such participants may become entitled . . . . It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter . . . .

29 U.S.C. § 1140. To recover under this provision, an employee must show "(1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee may become entitled." *Gavalik v. Continental Can Co.*, 812 F.2d 834, 852 (3d Cir.), *cert. denied*, 484 U.S. 979 (1987); *see also Berger v. Edgewater Steel Co.*, 911 F.2d 911, 922 (3d Cir. 1990), *cert. denied*, 499 U.S. 920 (1991). None of these elements are present in the current case.

Nothing in the record suggests that PECo engaged in prohibited employer conduct. PECo attempted none of the actions listed in § 510 as giving rise to a discrimination claim. None of the employees were "discharge[d], fine[d], suspend[ed], expel[led], [or] discipline[d]." They were simply allowed to retire when they wished. Nor were the class members "discriminate[d] against." PECo treated the class members no differently from any other workers. It announced the early retirement program to all employees at the same time after the April 7 meeting of senior management. As a result, the plaintiff class has failed to make out a claim under § 510.

In addition, under the law of this circuit, suits for discrimination under § 510 are "limited to actions affecting

the employer-employee relationship," not mere changes in the level of benefits. *Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan*, 24 F.3d 1491, 1503 (3d Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1099 (1995). PECo's early retirement offer only changed the benefit level of its pension plan; the plan did not alter PECo's relationship with its retirees.

Finally, nothing in the record indicates that PECo had the requisite intent for a discriminatory violation. To recover under § 510, a plaintiff must show that the defendant had a specific intent to violate ERISA. "Proof of incidental loss of benefits as a result of a termination will not constitute a violation of § 510." 812 F.2d at 851 (citations omitted).

For each of these reasons, the plaintiff class has failed to make out a claim for discrimination under ERISA § 510. As noted, the plaintiff class has also failed to make out a claim for common law estoppel. We will reverse the holding of the district court on both counts.

V.

Under the rule in *Fischer I*, PECo's liability turns on the point at which serious consideration began. Applying our understanding of serious consideration, we find that serious consideration began on April 7, 1990. Because all the members of the plaintiff class retired before this date, none were provided with material misinformation. The class's alternative theories of recovery likewise fail. We will reverse the holding of the district court and enter judgment for the defendant.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Filed October 1, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 95-1793 and 95-1794

HERBERT L. FISCHER; FLOYD L. ADAMS; JAMES W. ALFREDS; JOHN I. ARENA; EARL T. ATKINSON; WILLIAM AUVE; THOMAS F. BECK; WILLIAM J. BONO; WILLIAM A. BURWELL, JR., JOSEPH C. CALABRESE; PETER CARFAGNO; JOHN B. CREIGHTON; RALPH J. DAFERMO, SR.; FELIX A. DEJOSEPH; JOSEPH A. DEVITO; JOHN T. DOUGHERTY; JOHN J. DOWLING; ANTHONY FALASCA; EUGENE FINK; RITA J. GESUALDO; EDWIN HAINES; JOSEPH T. HALEY; DANIEL J. HEFFERAN; LEO M. HILL; ROBERT J. HOOPES; DONALD J. HOY; MICHAEL HRYNKO; DONALD HUGHES; CARL M. HUNSICKER; NEAL IRELAND; WALTER D. KRAUS; CHARLES E. LINDEMUTH; ROBERT F. MAHONEY; ANTHONY D. MARCHESANI; ROBERT P.F. MCCARON; ROBERT MCCORMICK; FRANK L. MERCADANTE; JOHN P. MONAGHAN; DAVID MONZO; JOHN K. MOORE; JOSEPH P. MORAN; MILDRED PEARL MORGAN; RALPH E. MOYER; HERBERT E. MUELLER; JAMES J. NUGENT; THOMAS E. OETZEL; FRANK W. PERSICHETTI, SR.; CHARLES W. PLUMMER; LEWIS RAIBLEY; JAMES J. RODDY; JOHN J. SAUNDERS; LOUIS F. SAUNDERS; NICHOLAS J. SCRENCI; JOSEPH J. SEMETTI; JOHN STEINDL; WILLIAM F. THOMPSON; MICHAEL W. TRENDLER; FRANCIS R. TUNNEY, SR.; HERBERT R. WALTERS; RICHARD S. WILSON; JOHN H. ZIMMER; GERALD A. ZIMMERMAN

v.

PHILADELPHIA ELECTRIC COMPANY; JOSEPH F. PAQUETTE, JR.; MICHAEL J. CROMMIE; SERVICE ANNUITY PLAN OF PHILADELPHIA ELECTRIC COMPANY

HERBERT L. FISCHER; JOHN B. CREIGHTON; FRANCIS R. TUNNEY, SR.; EARL ATKINSON; LEO M. HILL; DONALD HUGHES; JOSEPH P. MORAN; MICHAEL W. TRENDLER; JOHN H. ZIMMER; WILLIAM AUVE; JOHN STEINDL; LOUIS F. SAUNDERS; ROBERT MCCORMICK; WILLIAM J. BONO; JAMES J. RODDY; RITA J. GESUALDO; RALPH J. DAFERMO, SR.; JOSEPH C. CALABRESE; JAMES W. ALFREDS; FELIX A. DEJOSEPH; EUGENE FINK; JOSEPH T. HALEY; WALTER D. KRAUS; CHARLES W. PLUMMER; ROBERT P.F. MCCARRON; RICHARD S. WILSON; JOHN P. MONAGHAN; RALPH E. MOYER; JOHN J. DOWLING; JOSEPH J. SEMETTI; CHARLES E. LINDEMUTH; ROBERT F. MAHONEY; JOHN K. MOORE; JAMES J. NUGENT; JOHN J. SAUNDERS; ANTHONY FALASCA; DANIEL J. HEFFEREN; NICHOLAS J. SCRENCI; THOMAS E. OETZEL; DONALD J. HOY; FLOYD L. ADAMS; THOMAS F. BECK; JOHN T. DOUGHERTY; WILLIAM F. THOMPSON; GERALD A. ZIMMERMAN; HERBERT E. MUELLER; HERBERT R. WALTERS; LEWIS RAIBLEY; JOSEPH L. GIORGIO; JOSEPH DEVITO; DAVID MONZO; THOMAS J. LEE; THOMAS B. BARNES, JR.; PHILIP G. MULLIGAN; ROBERT L. TOMLINSON; JOHN R. GRIMES; W.B. WILLSEY; WILLIAM J. MOSS; JAMES T. PRYOR; ROBERT J. GLENN; GEORGE C. ZAPP; JOSEPH J. DELLA VECCHIO; GEORGE V. CHURACH; CHARLES T. REIMEL; ANDREW J. KELLEHER; GEORGE C. HALL; WILLIAM P. ZACKEY; FRANCIS W. BATIPPS; HARRY C. FRYMIARE, JR.; JOSEPH J. GRECO; RICHARD R. ROWLANDS; JESSE P. BOYD; JAMES D. DENNETT; VERNON C. READMAN, JR.; JOSEPH L. GIORGIO; EDWARD M. HAILE; EUGENE C. SCHINDLER; JOHN P. SWAHL; ELMER E. LUCAS; JAMES L. ROUSH; JAMES V. LEWIS; ALBERT J. RIEGER; THOMAS J. SHERIDAN, JR.; DOLORES A. ROMANO; HELEN J. THROCKMORTON; ROBERT E. SPROSS; WILLIAM P. ROHLFING; EDWARD C. KISTNER, JR.; HARRY W. BACKHOUSE; JAMES V. MANNION, JR.; JOSEPH E. BONAPARTE; WILLIAM A. BRADY, JR.; MALCOLM J. MACNEIL; MANUS J. COONEY; JOHN J. KUHNS; MARLENE BELL; DEAN G. BRADFORD; JAMES W. BATEMAN; JAMES S. HERRICK;

STANLEY W. JACQUES, JR.; RUDOLPH G. DELLA VECCHIO; ALDEN F. TUCKER & BERNARD J. DRESS,

Appellants in 95-1793

HERBERT L. FISCHER; FLOYD L. ADAMS; JAMES W. ALFREDS; JOHN I. ARENA; EARL T. ATKINSON; WILLIAM AUVE; THOMAS F. BECK; WILLIAM J. BONO; WILLIAM A. BURWELL, JR.; JOSEPH C. CALABRESE; PETER CARFAGNO; JOHN B. CREIGHTON; RALPH J. DAFERMO, SR.; FELIX A. DEJOSEPH; JOSEPH A. DEVITO; JOHN T. DOUGHERTY; JOHN J. DOWLING; ANTHONY FALASCA; EUGENE FINK; RITA J. GESUALDO; EDWIN HAINES; JOSEPH T. HALEY; DANIEL J. HEFFERAN; LEO M. HILL; ROBERT J. HOOPES; DONALD J. HOY; MICHAEL HRYNKO; DONALD HUGHES; CARL M. HUNSICKER; NEAL IRELAND; WALTER D. KRAUS; CHARLES E. LINDEMUTH; ROBERT F. MAHONEY; ANTHONY D. MARCHESANI; ROBERT P.F. MCCARRON; ROBERT MCCORMICK; FRANK L. MERCANDANTE; JOHN P. MONAGHAN; DAVID MONZO; JOHN K. MOORE; JOSEPH P. MORAN; MILDRED PEARL MORGAN; RALPH E. MOYER; HERBERT E. MUELLER; JAMES J. NUGENT; THOMAS E. OETZEL; FRANK W. PERSICHETTI, SR.; CHARLES W. PLUMMER; LEWIS RAIBLEY; JAMES J. RODDY; JOHN J. SAUNDERS; LOUIS F. SAUNDERS; NICHOLAS J. SCRENCI; JOSEPH J. SEMETTI; JOHN STEINDL; WILLIAM F. THOMPSON; MICHAEL W. TRENDLER; FRANCIS R. TUNNEY, SR.; HERBERT R. WALTERS; RICHARD S. WILSON; JOHN H. ZIMMER; GERALD A. ZIMMERMAN

v.

PHILADELPHIA ELECTRIC COMPANY; JOSEPH F. PAQUETTE, JR.; MICHAEL J. CROMMIE; SERVICE ANNUITY PLAN OF PHILADELPHIA ELECTRIC COMPANY

PECo Energy Company, formerly known as Philadelphia Electric Company, Joseph F. Paquette, Jr., Michael J. Crommie and Service Annuity Plan of Philadelphia Electric Company,

Appellants in 95-1794

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 90-cv-06020)

Argued April 29, 1996

Before: COWEN and ROTH, *Circuit Judges* and
CINDRICH,[1] *District Judge*

(Opinion filed October 1, 1996)

ORDER AMENDING SLIP OPINION

IT IS ORDERED that the slip opinion in the above case, filed on October 1, 1996, be amended as follows:

On page 5, line 27, add an "s" to the word "defendant".

On page 20, Section V., delete the last sentence and replace it with the following sentence:

> We will reverse the holding of the district court and enter judgment on behalf of all defendants.

By the Court,

/s/ Jane R. Roth
Circuit Judge

Dated: October 1, 1996

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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1. Honorable Robert J. Cindrich, United States District Court Judge for the Western District of Pennsylvania, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HERBERT L. FISCHER, ET AL.	:	
	:	
V.	:	C.A. NO. 90-8020
PHILADELPHIA ELECTRIC COMPANY ET AL.	:	
	:	May 16, 1994
DONALD R. KURZ, ET AL.	:	
V.	:	C.A. NO. 91-2771
PHILADELPHIA ELECTRIC COMPANY, ET AL.	:	

WEINER, J. May 13, 1994

MEMORANDUM OPINION AND ORDER

INTRODUCTION

These consolidated cases involve claims by two plaintiff classes against the Philadelphia Electric Company (PECO)[1] for violations of ERISA, 29 U.S.C. § 1101, et seq. arising out of changes made at two different time periods to PECO's pension plan. Plaintiffs claim PECO violated fiduciary duties under ERISA, are equitable estopped under ERISA from

1. Also named as defendants are the PECO pension plan and several key employees of PECO charged with making pension plan decisions at the relevant times of these two lawsuits.

denying the plaintiffs increased pension benefits, and have engaged in discriminatory conduct in violation of § 510 of ERISA, 29 U.S.C. § 1140.

By prior Memorandum Opinion and Order dated July 27, 1992, the court determined that summary judgment should be entered in favor of the defendants in both cases, based upon a lengthy Stipulation of Facts. In so holding, we found the plaintiff classes failed to state a cause of action because the stipulated facts, construed in the light most favorable to the plaintiffs, did not establish any material misrepresentations, upon which all of the plaintiffs' claims are founded. On appeal, the Court of Appeals for the Third Circuit remanded the matter for further proceedings, based upon deposition testimony of a class member which was not a part of the Stipulation.

The appeal in this matter also concerned the appropriate precedent to apply to those facts. We applied the holding of *Payonk v. HMW Industries, Inc.*, 883 F.2d 221 (3d Cir. 1989) that absent affirmative misrepresentations designed to mislead plan participants, an employer's decision to change pension benefits is not governed by ERISA's standards of fiduciary duties. The Court of Appeals, however, found the facts sub judice more like those presented in *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154 (6th Cir. 1988). The *Berlin* court had held that once an employer gave "serious consideration" to offering additional pension benefits, it was under an obligation as plan fiduciary "not to make misrepresentations, either negligently or intentionally, to potential plan participants concerning [the offering]". *Id.* at 1163-64. To its "ear", the deposition testimony of the class member to the effect that had he known the plan would be sweetened he would have waited to retire, echoed the facts of *Berlin* and was sufficient to preclude summary judgment.

Following remand, the court conducted a bench trial, limited to the issue of whether changes to the PECO pension plan were under "serious consideration" when members of the plaintiffs' classes met with PECO retirement counselors.

Based upon the testimony presented, the court makes the following additional findings of fact and conclusions of law for each case.[2]

FINDINGS OF FACT - Fischer

106. As early as May 1988, PECO began seeking information from its actuarial consultant on ways to improve its pension plan.

107. William Murdock, a consultant employed by the firm of Towers, Perrin, Forster & Crosby spoke with Michael Crommie, PECO's Director of Benefits on May 5, 1988. Among the other things they discussed was an early retirement program having as its features a 5 year age credit, and a 5 year service credit. Alternatively, they discussed a program involving an early retirement discount and one involving severance pay and Social Security supplements.

108. In his notes, Murdock recorded that PECO's Chief Financial Officer R.G. Gilmore was interested in targeting employees under age 55, particularly between ages 45 and 50. His suggestion was a "magic number", i.e. an employee might be eligible to participate if his age plus years of service totaled 65 years. A new plan was proposed incorporating a magic number system with a severance plan.

109. On May 11, 1988, Murdock noted a conversation in which a window period was discussed, and a different formula for age, years of service, severance pay and eligibility.

110. The next day, Murdock noted another conversation with several PECO executives which set a target work force reduction of 750 employees. The alternatives for reaching this target were a sweetener in the pension plan or involuntary terminations. Murdock also noted that under Public Utility Commission rules, if PECO were to replace employees who leave under a sweetener, it would not permit the sweetener costs to be included in PECO's rate base. Two additional variations on the early retirement window were also noted.

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2. Our Findings are numbered consecutively from the parties' Stipulations which are incorporated herein by reference.

One included a separation allowance or the alternative of purchasing an annuity contract to secure pension and medical benefits for retirees.

111. On May 18, 1988, C.L. Fritz sent a memo to Gilmore stating that it was the opinion of those investigating PECO's options that the desired reduction in the work force be achieved through a pension plan enhancement. The recommended program included a five year credit on both age and service, an allowance equal to four months base wage plus one additional week for each year of actual service, the established discounts applicable to early retirement would be retained, but based on adjusted age, and the company would have the right to retain any participant for up to one year due to business necessity.

112. On May 24, 1988, Murdoch had conversations with several PECO executives in which they discussed elements of a sweetener, including the purchase of an annuity by the company.

113. On May, 31, 1988, J.J. McGinley, PECO's manager of personnel and industrial relations, recommended that employees be able to elect to receive the allowance in a discounted cash payment.

114. When Joseph Paquette rejoined PECO in 1988, the company was in the midst of a program to restart the Peach Bottom Nuclear Plant and complete construction on the Limerick Nuclear Plant.

115. Paquette rejected any early retirement program at that time because the loss of qualified employees in the nuclear program would have had a negative impact on these two projects.

116. Paquette believed it would be illegal to announce an early retirement program which excluded the Nuclear Division.

117. Paquette issued instructions to subordinates that an early retirement program was not to be considered.

118. Beginning in 1989, Paquette redirected his attentions to PECO's long range goals. His goal became operational excellence at the company.

119. In pursuit of these goals, PECO engaged the firm of McKinsey and Company to examine all of PECO's operations and recommend long term cost cutting measures.

120. Paquette used the McKinsey study to calculate the savings to be had from an early retirement program and other operational changes.

121. From the time he rejoined PECO, Paquette had a long term goal to reduce the number of employees. However he did not develop a specific action plan to do so until March 1990.

122. The minutes of the October 23, 1989 meeting of PECO's Board of Directors records a statement by Paquette concerning the rate request before the PUC. The PUC staff had recommended that PECO receive only $200 million of the $550 million it requested. The Consumer Advocate had recommended only $75 million.

123. On December 13, 1989, Paquette held three meetings with employees of PECO in which he talked about how important the rate case was to the company. If the PUC did not grant the entire increase, PECO would not be able to maintain its dividend to stock holders.

124. At that meeting he was asked whether an early retirement program had been discussed. He responded the company did not have a plan for an early retirement program. If the PUC did not grant the entire request, he said the company would appeal if it believed it could succeed. But beyond that, he said, the company did not have a plan because it would not know where it would end up. When it received the PUC decision, Paquette said the company would evaluate what had to be done in terms of the dividend and whether to implement cost cutting. He told the employees that any cost cutting would first be to reduce employees through attrition, possibly an early retirement program, and lastly through layoffs.

125. During the period between the staff report and the final decision by the PUC on PECO's rate request, the number of inquiries by employees to the benefits division concerning the possibility of an early retirement program grew. Crommie credited this increase with employees concerns over

PECO's need to cut costs if unsuccessful before the PUC. Crommie's staff continued to consistently answer these questions by denying any knowledge of the staff of any plan.

126. Had he known that a retirement incentive program was being considered prior to April 1, 1990, Crommie would have informed those people who had indicated they intended to retire on April 1, 1990.

127. On March 12, 1990, some two years after his work for PECO in 1988, Murdoch was contacted by Ken Lefkowitz, PECO's manager of benefits. Lefkowitz stated the company's concern about its rate case before the PUC and PECO's need to reduce costs quickly. The question of an early retirement sweetener was raised as a possible method.

128. On March 20, Murdoch again spoke with Lefkowitz. He was directed to develop alternatives for a reduction in force program. One alternative was a "pension type from 3 - 4 years ago". He was also to examine voluntary programs and assess legal aspects and costs.

129. On March 28, Murdoch presented his analysis of three alternative open window programs for staff reduction at PECO. The first was a broad based voluntary approach designed to eliminate one thousand or more employees. The second was a smaller program. The third was an involuntary program.

130. The provisions of the first alternative were similar to the sweetener discussed but never implemented in 1988. The first alternative included a five year credit for both age and service, severance pay of four months wages plus one additional week for each year of actual service and a magic number formula for eligibility.

131. Towers, Perrin did no work for PECO on window type plans between June 1988 and March 1990. Prior to March 1990, Towers, Perrin was not asked to prepare contingency plans in the event PECO lost its rate case before the PUC.

132. The "5 + 5" provision, i.e. a credit of five years age and years of service is contained in many pension plan enhancements.

133. The 1990 plan differed from the 1988 plan in at least two aspects: the definition of the eligible group, and the severance provisions.

134. Because the McKinsey study had as its purpose long term cost cutting, Paquette never considered extending the early retirement program to those already retired since this would have increased PECO's costs.

135. On March 30, 1990, Larry Kanarek of McKinsey & Co. sent a letter to Joseph Friderichs of PECO setting out a possible agenda for cost cutting. Included was a discussion of reductions in force through a combination of layoffs, accelerated retirements or attrition.

136. Murdoch had additional discussions with PECO personnel on April 2, 5 and 6 in which details of the sweetener were discussed.

137. On April 2, 1990, Lefkowitz transmitted a report dated March 29 to Paquette on reductions in force. This report, which was hand written for confidentiality purposes, describes the three alternatives identified by Murdoch in his March 28 letter.

138. Also on April 2, Paquette asked that a study be prepared comparing staffing levels with electric only utilities. This report was also hand written.

139. On April 7, 1990 senior PECO executives attended a corporate strategy meeting. Notes of the meeting indicate that Paquette intended to announce targets and programs for achieving $100 million in cost cutting on April 20. It is further noted that those in attendance were instructed to give no information to anyone regarding their discussions to date.

140. On April 13, 1990, Towers, Perrin transmitted to PECO the results of a survey it conducted on the prevalence of window plans over the past six years.

141. On April 19, 1990, following the announcement of the PUC's decision on the rate case, Paquette sent a letter to all employees announcing substantial cost savings and his recommendations that the Board approve an early retirement program and cut the common stock dividend.

142. Also on April 19, 1990, Murdoch noted a conversation with Lefkowitz about possible elements of the sweetener,

including the five year credits, severance pay and the right of the company to retain employees who want to participate for up to one year.

143. On April 26, 1990 Michael Crommie sent a letter to all those who had announced their intention to retire, telling them they may wish to delay their retirement until the early retirement package was finalized.

144. Also on April 26, Murdoch noted that one of the alternatives developed was the 1988 program.

145. On May 25, 1990, the PECO Board officially adopted the proposed early retirement plan. The plan provided for a five year credit on age and years of service, waiver of the early retirement discount, a window period for acceptance, and the company's right to delay the retirement of any crucial employee.

146. Although included in their proposed findings of fact, plaintiffs have offered no evidence of employees changing their retirement dates so as to be able to participate in the early retirement program or receiving privileged information not available to other members of the class.

FINDINGS OF FACT - Kurz

111. A pension funding study completed October 2, 1985 concluded that PECO's plan was well funded and that the current level of pension expense as a percentage of payroll would be enough to cover the cost of future plan improvements.

112. Based upon a previous study, PECO's director of employee services wrote on October 22, 1985 that PECO's position relative to other utilities' pension benefits was deteriorating, especially for management employees. PECO ranked 18th among those surveyed.

113. On June 23, 1986, Crommie sent a memo to Downs setting forth plans to conduct another pension study. Downs returned it to Crommie with a notation that it obviously some input from TPF&C will be required with regard to our recommended modifications to plan!"

114. According to Mr. Fritz, as of March 5, 1987, PECO considered not only improving the plan for journeyman level employees, but also higher management type positions.

115. In March 1987, Fritz met with representatives from the Independent Group Association (IGA), PECO unofficial employee representative. The purpose was to begin preliminary discussions of a wage and benefit package to be implemented on August 1, 1987. Fritz stated that the timing was right for making significant changes in the pension plan, and that the company was looking into several alternatives, including the IGA's proposal from the year before. Fritz anticipated that the change would be in the order of a ten percent increase.

116. Billings from Towers Perrin indicate that the firm was doing consulting for PECO on its pension plan in February 1987.

117. In March 1987, Don Fleischer of Towers Perrin began calculating benefit projections for senior PECO officers to include lump sum distributions based on changes to Part A of the pension plan ranging from 1.0 to 1.25% per year of service. These improvements were estimated to cost $15 million. Towers Perrin also did work on the tax consequences to senior management of the plan.

118. Through the month of April 1987, Towers Perrin continued working on proposed changes to the plan.

119. At the April 24 meeting with the IGA, Fritz stated that this was a good year for changes to the plan, since it was well funded and PECO's plan was below the industry norm. He commented that many formulas had been considered and had been narrowed to five. He also commented that the Personnel Department was scheduled to meet with Everett and Austin on June 19 and the Board of Directors on June 22.

120. On May 6, 1987, Murdoch met with Crommie to discuss two competing alternatives for changing the plan.

121. On May 11, Murdoch noted a conversation with Fritz in which Fritz mentioned the company was getting pressure from the IGA to improve the plan. Fritz was concerned about the costs of the two alternatives presented.

122. On May 20, Towers Perrin personnel prepared a discussion outline of PECO's retirement plan study. It noted that PECO's normal retirement benefits were below average of the survey group at all pay levels and even less favorable at higher

pay levels. It commented that PECO needed to improve its pension, especially at executive levels, recommending that alternative pension improvements should take into consideration 1. objectives for income replacement at various pay levels, 2. the company's desired competitive posture, 3. cost implications for alternatives, 4. posture with respect to introduction of company-matching contribution in savings plan, and 5. other benefits such as life insurance and medical benefits.

123. The then current plan contained two parts. Part A was calculated at 5% plus 1.0% times the employee's 5 year average base salary times years of service. Part B was calculated at 0.3% times the 5 year average base salary in excess of Social Security-Covered Compensation times years of service. Towers Perrin proposed seven alternate benefit improvements. Proposal #1 increase the Part A multiple from 1.0% to 1.15%. Proposal #2 increased it to 1.2%. Proposal #3 increased to 1.25%. Proposal #4 increased the Part A multiple to 1.2% and the Part B multiple from 0.3% to 0.4%. Proposal #5 increased Part A to 1.15% and Part B to 0.4%. Proposal #5 increased Part A to 1.15% and Part B to 0.35%. Proposal #6 increased Part B to 0.5% with an early retirement supplement of 0.2% per year of service times average pay up to covered compensation, payable from the date of early retirement to age 62 or 65 or Social Security Retirement Age. Proposal #7 increased Part A to 1.1% and Part B to 0.35%.

124. Don Fleischer had previously outlined the first four proposals to PECO as early as April 2, 1987, and provided additional and updated information on April 13 and April 20, 1987.

125. The 1986 Pension Survey Report presented May 22, 1987 by PECO's Employee Services Division, showed that among 23 participants, PECO ranked between 13th and 18th in seven different case comparisons. The reports notes that the IGA requested the Part A formula be modified to provide 1.2% for each year of service plus 10%, up to a maximum of 60% with no change in Part B. This change would have ranked PECO between second and fourth in the seven different case comparisons.

126. The Employee Services Division included in the Report only the first four alternatives detailed in Towers Perrin's May 20 outline. It concluded, given PECO's deteriorating position vis a vis other utilities, that the time for a pension change had arrived and recommended that Alternative #4 be adopted with an effective date of August 1, 1987.

127. Towers Perrin reached the same conclusion in its report also dated May 22, 1987.

128. Everett and Austin submitted the report to the Board on May 22, 1987.

129. On May 13, 1987, Fleischer noted a conversation with John McGinley and Fred Beaver of PECO that the company was being pressured by the IGA for improvements to the pension plan and that "some commitment [had] already [been] made".

130. PECO announced the change to the pension plan on July 2, 1987.

131. On July 2, 1987, PECO senior managers met with representatives of the IGA to present the wage and benefit package to be implemented on August 1, 1987.

132. Shortly after the wage and benefit package was approved, the Benefits Division contacted those who indicated a desire to retire on July 1, 1987, advising them of the pending change.

133. The cost of the plan actually adopted in 1987 was $9 million per year.

134. The persons having authority in 1987 to recommend that the PECO Board of Directors implement the pension plan changes were Everett and Austin, the president and chairman of the board.

135. In 1985 - 1986, PECO also examined proposed changes to the pension plan to Part A and Part B of the pension formula. No changes were made at that time.

136. PECO frequently reexamined its pension plan as part of a review of overall employee benefits to keep it up to date with the industry and to correct for inflation.

137. The pensions of senior management were calculated in the same manner as every other employee.

138. There was no official policy at PECO to conceal the fact that company conducted periodic reviews of the pension plan. However, specific proposals to amend the plan were kept confidential until the point that the Board made a decision. The reason for this procedure was the company's desire that all employees receive the same information at the same time. Also senior management did not want to tie the hands of the Board or make representations to employees that might not be implemented.

139. The practice at PECO, when an employee inquired as to changes in the plan, was to state that no policy is changed until a decision is made by the Board, but that the plan is reviewed on a continuous basis.

140. It was the policy of the Benefits Division to answer employee inquiries about possible changes to the pension plan by saying, "to our knowledge there are no changes, however if you wish to take advantage of remaining on the payroll until an announcement is made whether or not there will be a change, is your prerogative".

141. John McCartney was a senior benefits counselor at PECO before he retired. If prospective retirees inquired about possible changes to the pension plan, he would go to Crommie to ask if there were any changes coming. In that circumstance, Crommie responded in the negative, and McCartney passed that information along.

142. Jill Lobb was a senior benefits counselor. It was not uncommon for her to be asked by potential retirees if the plan was about to be changed. She was never told when a change was going to be implemented, even though the retirees expected that she would have that information.

143. There was never any policy at PECO to purposely deprive an employee of pension improvements.

144. Fred Beaver first began seeing erosion in PECO's pension plan, vis-a-vis the industry, in 1983. The reason for the erosion was other companies' improvements to their plans.

145. In the period of 1986 and 1987, Beaver was frequently asked by prospective retirees whether the pension plan might change. He would neither comment that a change was going to happen or not going to happen. As a fiduciary of

the plan, Beaver tried to avoid raising expectations in case the Board did not vote to change the plan. Beaver knew in February 1987 that the Board would vote at its June meeting on a wage package.

146. Several members of the plaintiffs' class knew that changes to the wage and benefit package were commonly announced by the company the week before the July 4th Holiday and implemented as of August 1.

CONCLUSIONS OF LAW - FISCHER

1. This court has jurisdiction over this matter pursuant to 28 U.S.C. §1331 and 29 U.S.C. §1001, et seq.

2. Venue is appropriate in this district pursuant to 28 U.S.C. §1391(b) and 29 U.S.C. §1132(e)(2).

3. Under the law of the case, as determined by the Court of Appeals, a plan administrator such as PECO cannot make affirmative material misrepresentations to Plan participants in response to direct inquiries.

4. Included within the overall materiality inquiry will be an inquiry into the seriousness with which a particular change to an employee pension plan is being considered at the time the misrepresentation is made.

5. "Serious consideration" is not to be tied to a single objective event, but rather must be viewed within the overall materiality inquiry at the time the misrepresentation is made.

6. An employer such as PECO, which self-administers its pension plan and conducts ongoing appraisals of the plan's viability and adequacy is under no obligation to inform plan beneficiaries every time it conducts a review of the plan.

7. The duty to inform plan participants arises when specific proposals are being seriously discussed for implementation by those in authority to implement such changes.

8. The 1988 discussions between PECO and Towers Perrin were part of an ongoing review of the pension plan, carried out as part of PECO's ordinary course of business.

9. The "plan" discussed in 1988 was never adopted. Although certain elements of the plan were similar to that eventually adopted in 1990, there was no evidence presented to indicate that the discussions in 1988 were seriously consid-

ered for implementation by those in authority at PECO responsible to make decisions on whether to amend the pension plan.

10. Plaintiffs have presented evidence that on December 13, 1989, Paquette held three meetings with employees of PECO in which he talked about how important the PUC rate case was to the company. At that meeting Paquette was asked whether an early retirement program had been discussed. He responded the company did not have a plan for an early retirement program. If the PUC did not grant the entire request, he said the company would appeal if it believed it could succeed. But beyond that, he said, the company did not have a plan because it would not know where it would end up.

11. At the time these statements were made, PECO had not yet begun serious consideration of an early retirement plan. There was no evidence presented during this time period that PECO senior management had yet begun evaluating possible cost cutting measures. The only evidence of record which lends any support to the conclusion that Paquette's statements were misleading are the minutes of the October 23, 1989 meeting of PECO's Board of Directors, which records a statement by Paquette concerning the rate request before the PUC. At that time he informed the Board that the PUC staff had recommended that PECO receive only $200 million of the $550 million it requested and the Consumer Advocate had recommended only $75 million.

12. We do not find it more likely than not from Paquette's statement to the Board in October, that an inference can be drawn that PECO was planning an early retirement plan at the time of Paquette's statements to the employees in December. There was no other evidence offered to tie Paquette's statements to the Board with other affirmative acts by PECO to change the retirement plan in December.

13. The earliest time that PECO took affirmative action to change the retirement plan was March 12, 1990, when Ken Lefkowitz, PECO's manager of benefits, contacted Towers Perrin. Lefkowitz stated the company's concern about its rate case before the PUC and PECO's need to reduce costs

quickly. The question of an early retirement sweetener was raised as a possible method at this time.

14. Thereafter, PECO undertook systematic activity to implement an early retirement plan.

15. At this same time, PECO's retirement counselors were still informing potential retirees that they had no knowledge of any pending early retirement plans being offered by the company.

16. The obligation of the company to inform retirees of the pending plan could not be circumvented by building a wall around those employees on whom plan participants reasonable relied for important information and guidance about retirement.

17. From March 12, 1990, PECO was seriously considering the early retirement plan which was announced on April 19, 1990. Any person who sought information from PECO's benefits counselors after March 12, 1990 and was informed the company had no plan to implement an early retirement plan received material misinformation.

18. The Fischer class consists of former employees of PECO who retired January 1, 1990, February 1, 1990, March 1, 1990 or April 1, 1990, who would have reached age 50 on or before December 31, 1990 and who would have completed five or more years of credited service under the company's pension plan as of December 31, 990 had they still been employed by PECO at that time.

19. Some but not all members of the Fischer class have successfully demonstrated that they were subjected to material misrepresentations of fact. Specifically, any member of the class who solicited information and retired after PECO's duty to inform retirees of the pending change arose on March 12, 1990, has proven by a preponderance of the evidence that PECO violated a fiduciary duty imposed by ERISA and is entitled to relief thereunder.

20. These same persons have proven by a preponderance of the evidence their claim of common law estoppel. We find that (1) the party to be estopped, PECO, misrepresented material fact as discussed above; (2) PECO was aware of the true facts; (3) PECO had reason to believe the statement

would be relied on; (4) the class members described in ¶ 19 did not know or could not have known the true facts; and (5) the class members described in ¶ 19 reasonably relied on the misrepresentations.

21. These same persons have proved by a preponderance of the evidence that PECO engaged in conduct violative of § 510 of ERISA. Section 510 provides, inter alia, that it shall be unlawful for any person to discriminate against a participant or beneficiary for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan. By misrepresenting to potential retirees that the company was not seriously considering implementing the early retirement plan, PECO improperly induced them to retire or induced them not to defer their retirements to take advantage of the plan.

22. Plaintiffs have alleged that PECO also engaged in discriminatory conduct by providing some employees with privileged information regarding the early retirement plan. Although plaintiffs' proposed findings of fact make reference to two memoranda, an issue of the PECO publication Perspectives, and an affidavit, the trial record does not contain these exhibits. Plaintiffs have not offered any other evidence of discriminatory conduct in this regard.

23. In accordance with Fed. R. Civ. P. 23, the court certifies two subclasses: Subclass A shall consist of those members of the Fischer class described in ¶ 19; Subclass B shall consist of all other members of the Fischer class.

24. Given the complexity of the legal question involved in this matter; i.e. the overall materiality inquiry and the seriousness with which the particular change to the employee pension plan was being considered at the time the misrepresentations were made, the court finds, pursuant to 28 U.S.C. § 1292(b) that this decision involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this decision will materially advance the ultimate termination of the litigation.

CONCLUSIONS OF LAW - KURZ

1. This court has jurisdiction over this matter pursuant to 28 U.S.C. §1331 and 29 U.S.C. §1001, et seq.

2. Venue is appropriate in this district pursuant to 28 U.S.C. §1391(b) and 29 U.S.C. §1132(e)(2).

3. Under the law of the case, as determined by the Court of Appeals, a plan administrator such as PECO cannot make affirmative material misrepresentations to plan participants in response to direct inquiries.

4. Included within the overall materiality inquiry will be an inquiry into the seriousness with which a particular change to an employee pension plan is being considered at the time the misrepresentation is made.

5. "Serious consideration" is not to be tied to a single objective event, but rather must be viewed within the overall materiality inquiry at the time the misrepresentation is made.

6. An employer such as PECO, which self-administers its pension plan and conducts ongoing appraisals of the plan's viability and adequacy is under no obligation to inform plan beneficiaries every time it conducts a review of the plan.

7. The duty to inform plan participants arises when specific proposals are being seriously discussed for implementation be those in authority to implement such changes.

8. The 1985 - 1986 examination of proposed changes to Part A and Part B of the pension formula was not the type of action that triggered PECO's fiduciary duty to inform potential retirees that changes to the plan were under serious consideration. No changes were made at that time. The 1985 - 1986 review was part of PECO's frequent reexamination of its pension plan as part of a review of overall employee benefits to keep it up to date with the industry and to correct for inflation.

9. PECO's fiduciary duty to inform potential retirees that changes to the plan might be coming arose in March 1987.

10. At that time, according to Mr. Fritz, PECO began considering not only improving the plan for journeyman level employees, but also higher management type positions. Fritz had met with IGA representatives and stated that the timing was right for making significant changes in the pension plan,

and that the company was looking into several alternatives, including the IGA's proposal from the year before. Fritz represented that the change would be in the order of a ten percent increase.

11. Also in March 1987, Towers Perrin began calculating specific benefit projections for senior PECO officers.

12. Also supporting this conclusion are the notes of Don Fleischer of Towers Perrin of May 13, 1987, in which he noted a conversation with John McGinley and Fred Beaver of PECO that the company was being pressured by the IGA for improvements to the pension plan and that "some commitment [had] already [been] made". These PECO executives, at least, believed the company had been seriously considering improving the pension formula for some time.

13. Thereafter, PECO undertook systematic activity to implement an early retirement plan.

14. At this same time, PECO's retirement counselors were still informing potential retirees that they had no knowledge of any pending early retirement plans being offered by the company.

15. The obligation of the company to inform retirees of the pending plan could not be circumvented by building a wall around those employees on whom plan participants reasonable relied for important information and guidance about retirement.

16. From March 1987, PECO was seriously considering the early retirement plan which was announced on August 1, 1987. Any person who sought information from PECO's benefits counselors after March 1, 1987 and was informed the company had no plan to implement an early retirement plan received material misinformation.

17. The Kurz class consists of former employees of PECO who retired from January through and including June 1987 under the PECO Service Annuity Plan effective January 1, 1987.

18. Some but not all members of the Kurz class have successfully demonstrated that they were subjected to material misrepresentations of fact. Specifically, any member of the class who solicited information and retired after PECO's duty

to inform retirees of the pending change arose on March 1, 1987, has proven by a preponderance of the evidence that PECO violated a fiduciary duty imposed by ERISA and is entitled to relief thereunder.

19. These same persons have proven by a preponderance of the evidence their claim of common law estoppel. We find that (1) the party to be estopped, PECO, misrepresented material fact as discussed above; (2) PECO was aware of the true facts; (3) PECO had reason to believe the statement would be relied on; (4) the class members described in ¶ 18 did not know or could not have known the true facts; and (5) the class members described in ¶ 18 reasonably relied on the misrepresentations.

20. These same persons have proved by a preponderance of the evidence that PECO engaged in conduct violative of § 510 of ERISA. Section 510 provides, inter alia, that it shall be unlawful for any person to discriminate against a participant or beneficiary for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan. By misrepresenting to potential retirees that the company was not seriously considering implementing the early retirement plan, PECO improperly induced them to retire or induced them not to defer their retirements to take advantage of the plan.

21. In accordance with Fed. R. Civ. P. 23, the court certifies two subclasses: Subclass A shall consist of those members of the Kurz class described in ¶ 18; Subclass B shall consist of all other members of the Kurz class.

22. The claims of Subclass A are not barred by the applicable statute of limitations found at 29 U.S.C. § 1113.

23. The class action complaint clearly sounds in concealment. The heart of the complaint is PECO's concealment of the plan to implement the early retirement plan. PECO admits it had a policy of keeping such matters confidential and telling potential retirees that no such plans existed until formally announced.

24. Section 1113 provides a six year statute of limitation for cases of concealment, measured from the time the plaintiff discovers the breach or violation.

25. Members of the plaintiffs' class discovered the breach or violation as early as June 1987. Suit was filed in this matter April 30, 1991, less than six years later.

26. Given the complexity of the legal question involved in this matter; i.e. the overall materiality inquiry and the seriousness with which the particular change to the employee pension plan was being considered at the time the misrepresentations were made, the court finds, pursuant to 28 U.S.C. § 1292(b) that this decision involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this decision will materially advance the ultimate termination of the litigation.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HERBERT L. FISCHER, ET AL.	:	
	:	
V.	:	C.A. NO. 90-8020
PHILADELPHIA ELECTRIC COMPANY ET AL.	:	
DONALD R. KURZ, ET AL.	:	
V.	:	C.A. NO. 91-2771
PHILADELPHIA ELECTRIC COMPANY, ET AL.	:	

ORDER

Pursuant to Fed. R. Civ. P. 23, the court CERTIFIES the following subclasses in C.A. NO.90-8020: Subclass A shall consist of all those members of the *Fischer* class who solicited information and retired after PECO's duty to inform retirees of the pending change arose on March 12, 1990. Subclass B shall consist of all other members of the *Fischer* class.

Judgment on the issue of liability is hereby ENTERED in favor of Subclass A of the *Fischer* class and against defendants Philadelphia Electric Company, Joseph F. Paquette, Jr., Michael J. Crommie and the Service Annuity Plan of Philadelphia Electric Company.

Judgment on all issues is hereby ENTERED in favor of all defendants and against Subclass B of the *Fischer* class.

Pursuant to Fed. R. Civ. P. 23, the court CERTIFIES the following subclasses in C.A. NO.91-2771: Subclass A shall

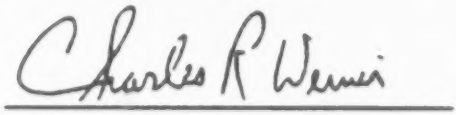
consist of all those members of the *Kurz* class who solicited information and retired after PECO's duty to inform retirees of the pending change arose on March 1, 1987. Subclass B shall consist of all other members of the *Kurz* class.

Judgment on the issue of liability is hereby ENTERED in favor of Subclass A of the *Kurz* class and against defendants Philadelphia Electric Company, the Service Annuity Plan of Philadelphia Electric Company, Charles L. Fritz, J.L. Everett, III, and John H. Austin, Jr.

Judgment on all issues is hereby ENTERED in favor of all defendants and against Subclass B of the *Kurz* class.

Pursuant to 28 U.S.C. § 1292 (b), the court's decisions in C.A. NO. 90-8020 and C.A. NO. 91-2771 are CERTIFIED for immediate appeal to the United States Court of Appeals for the Third Circuit. The court finds this Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this Order may materially advance the ultimate termination of this litigation.

IT IS SO ORDERED



CHARLES R. WEINER

AUG 22 1995 FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HERBERT L. FISCHER, ET AL.	:	
	:	
v.	:	C.A. NO. 90-8020
	:	
PHILADELPHIA ELECTRIC COMPANY, ET AL.	:	
	:	
DONALD R. KURZ, ET AL.	:	
	:	
v.	:	C.A. NO. 91-2771
	:	
PHILADELPHIA ELECTRIC COMPANY, ET AL.	:	

ENTERED: AUG 23 1995 CLERK OF COURT

WEINER, J.

August 9, 1995

MEMORANDUM OPINION AND ORDER

By prior Memorandum Opinion and Order of May 13, 1994, the court made findings of fact and conclusions of law limited to the question of whether changes to the PECO pension plan were under serious consideration when members of the plaintiffs' classes met with PECO retirement counselors. Based upon the testimony presented, the court determined that PECO was seriously considering the changes to the pension plan at issue in *Fischer* on March 12, 1990. We determined that PECO was seriously considering the changes to the pension plan at issue in *Kurz* on March 1, 1987. Because some but not all the members of the two classes were thus entitled to relief, we certified two subclasses in each case, separating those members of the class who had prevailed on their claims from those who did not.[1] Presently before the court is the damages portion of the suit, submitted by stipulation of the

1. In *Fisher*, Subclass A consists of all those members of the *Fischer* class who solicited information and retired after PECO's duty to inform

parties. The parties have agreed upon the amounts members of each class would be entitled to receive if they are found to be members of Subclass A. The question we must answer is which members of each class fall into which of the subclasses previously certified by the court.

In *Fisher,* the parties have stipulated to the identity of those members of class who both met with PECO retirement counselors to ask about changes to the company pension plan and retired after March 12, 1990, as well as the identity of those class members who retired after that date but met with PECO retirement counselors to ask about changes to the company pension plan before March 12, 1990. They have also stipulated to the identity of those members of class who retired after March 12, 1995, but either did not ask about a pension plan sweetener or about whom there is no evidence of such communications.

Similarly, in *Kurz,* the parties have stipulated to the identity of those members of class who both met with PECO retirement counselors to ask about changes to the company pension plan and retired after March 1, 1987, as well as the identity of those class members who met with PECO retirement counselors to ask about changes to the company pension plan before March 1, 1987, but who retired after that date. They have also stipulated to the identity of those members of the class who retired after March 12, 1995, but either did not ask about a pension plan sweetener or about whom there is no evidence of such communications. In addition, in *Kurz,* there are members of the class who retired on March 1, 1987.

To determine which groups are entitled to damages, we must resolve a question left open by our prior opinion: once PECO began to seriously consider changes to the plan and

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NOTES *(Continued)*

retirees of the pending change arose on March 12, 1990. Subclass B consists of all other members of the *Fischer* class.

In *Kurz,* Subclass A consists of all those members of the *Kurz* class who solicited information and retired after PECO's duty to inform retirees of the pending change arose on March 1, 1987. Subclass B consists of all other members of the *Kurz* class.

their duty to inform class members thus arose, did they also have a duty to correct information it previously provided before that date, to the effect that no change was forthcoming? We must also determine whether PECO was under an affirmative duty to inform those who did not ask about a pension plan sweetener in their pre-retirement interviews.[2]

In *Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund*, 12 F.3d 1292 (3d Cir. 1993), the court confirmed the continuing nature of ERISA fiduciary duties when responding to inquiries from plan beneficiaries, holding:

> Acknowledging, as we [also] do today, that ERISA's fiduciary duty section incorporates the common law of trusts, the Appellate Court [in *Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747 (D.C.Cir. 1990)] found the duty to disclose material information 'is the core of a fiduciary's responsibility.' *Id.* at 750. As set forth in the Restatement (Second) of Trusts,
>
> > [The trustee] is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person.
>
> Restatement (Second) of Trusts § 173, comment d (1959).
>
> This duty to inform is a constant thread in the relationship between beneficiary and trustee; it entails not

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2. Several months after we filed our Findings of Fact and Conclusions of Law, plaintiffs filed a "motion for clarification", seeking an order expanding the court's definition of the prevailing subclasses to include those groups who solicited information before the dates of serious consideration. We denied the motion on the basis that the plaintiffs were in fact seeking to alter or amend our judgment after the time period provided by the Federal Rules. However, given the recent decisions of the Court of Appeals for the Third Circuit, discussing the parameters of the fiduciary duty owed to plan beneficiaries under ERISA, we find that our denial of the plaintiffs' motion should be corrected. Accordingly, in the interests of justice, we will vacate our Order of May 9, 1995, to the extent that it denied the plaintiffs' motion for clarification.

> only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful.

Bixler, 12 F.3d at 1300. Just within the past two months, the court has stated in even stronger terms that a plan administrator breaches his fiduciary duty when it "misrepresents the terms of the plan or fails to provide information when it knows that its failure to do so might cause harm. . ." *In re Unisys Corp.,* 57 F.3d 1255 1264 (3d Cir. 1995). In so holding, the court rejected the plan administrator's argument that *Bixler* must be limited to situations where the administrator breaches its duty based upon a failure to disclose present circumstances that may affect an employee's present right to specific benefits under the plan. Instead, the court held that an ERISA fiduciary has an affirmative obligation to answer participants' questions forthrightly, and a duty to communicate complete and accurate information about a beneficiary's status. Because the administrator was aware of employee confusion regarding changes to the terms of its plan, the court found it had a duty to convey complete and accurate information. *Unisys,* 57 F.3d at 1265-66, n. 15.

Given these recent restatements of the parameters of the plan administrator's duties, we find that PECO had an affirmative duty to correct information it previously provided before the changes to the plans were under serious consideration, to the effect that no change was forthcoming. Like in *Unisys,* PECO was aware of concern regarding changes to the plan before it was implemented; it had an affirmative duty to inform beneficiaries that it had given them incorrect or incomplete information when it knew that its silence would be harmful. We also find that PECO was under an affirmative duty to inform those who did not ask about a pension plan sweetener in their pre-retirement interviews. As the court stated in *Bixler,* the fiduciary has an obligation to convey complete and accurate information, "even if that information comprises elements about which the beneficiary has not specifically inquired." *Id.* at 1300. Accordingly, it is immaterial whether members of the class specifically solicited and were given incorrect information. So long as they retired after Peco began

seriously considering a plan change and were not informed of this fact, they have prevailed on their claims.[3]

Based upon these conclusions, and the parties' stipulation, the following is a list of members of the *Fisher* class who we find are members of Subclass A and the amounts of their lost benefits:

Arena	$ 66,433
Goodwin	116,592
Persichetti	58,510
Teti	95,975
Burwell	102,116
Carfagno	78,054
Haines	47,971
Hoopes	76,892
Hrynko	96,735
Hunsicker	78,762
Ireland	84,025
Marchesani	51,577
Mercadante	77,057
Stryker	52,605
Wheat	84,101
Walls	47,954
Woodward	63,517
Irwin	125,199
McIntyre	63,095
Sherman	71,469

Based upon the above conclusions, and the parties' stipulation, the following is a list of members of the *Kurz* class who we find are members of Subclass A and the amounts of their lost benefits:

Cochran	$49,261
Hennessey	79,393
Messner	60,308
Scott	65,775

3. The only members of the two classes who we find do not prevail on their claims are those members of the *Kurz* class who retired on March 1, 1987. Since they did not retire after the day PECO's duty arose, they were not subjected to material misrepresentations. Accordingly, these members will be assigned to Subclass B.

Capoferri	51,526
Chew	55,327
Kurz	50,081
Janiak	47,263
Smoyer	51,666
Brown	61,507
Watt	88,967
Griffin	21,200
Vetner	48,267
Snyder	59,732
Granger	39,009
Gibialante	43,921
Uva	53,641
Sharkey, J.C.	25,718
Nusspickle	50,696
Munley	48,375
Sharkey, W.J.	27,723
LaRue	37,295
McDuffy	38,725
Catanzaro	53,649
Foehl	57,399
Carson	65,015
McGuinn	54,609
Edwards	68,683
Purdum	82,556
Hammer	34,847
Richmann	61,208
Wagner	60,617
Monzo	40,542
Morgan	45,962
McEntee	53,301

An appropriate order follows . . .

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HERBERT L. FISCHER, ET AL.	:	
	:	
v.	:	C.A. NO. 90-8020
	:	
PHILADELPHIA ELECTRIC COMPANY, ET AL.	:	
	:	
DONALD R. KURZ, ET AL.	:	
	:	
v.	:	C.A. NO. 91-2771
	:	
PHILADELPHIA ELECTRIC COMPANY, ET AL.	:	

ORDER

Judgment is entered in C.A. No. 90-8020 for the following members of the *Fisher* Subclass A in the following amounts, against defendant Philadelphia Electric Company:

Arena	$ 66,433
Goodwin	116,592
Persichetti	58,510
Teti	95,975
Burwell	102,116
Carfagno	78,054
Haines	47,971
Hoopes	76,892
Hrynko	96,735
Hunsicker	78,762
Ireland	84,025
Marchesani	51,577
Mercadante	77,057
Stryker	52,605
Wheat	84,101
Walls	47,954
Woodward	63,517
Irwin	125,199
McIntyre	63,095
Sherman	71,469

Judgment is entered in favor of defendant Philadelphia Electric Company against all other members of the *Fisher* Class.

Judgment is entered in C.A. No. 91-2771 for the following members of the *Kurz* Subclass A in the following amounts, against defendant Philadelphia Electric Company:

Cochran	$49,261
Hennessey	79,393
Messner	60,308
Scott	65,775
Capoferri	51,526
Chew	55,327
Kurz	50,081
Janiak	47,263
Smoyer	51,666
Brown	61,507
Watt	88,967
Griffin	21,200
Vetner	48,267
Snyder	59,732
Granger	39,009
Gibialante	43,921
Uva	53,641
Sharkey, J.C.	25,718
Nusspickle	50,696
Munley	48,375
Sharkey, W.J.	27,723
LaRue	37,295
McDuffy	38,725
Catanzaro	53,649
Foehl	57,399
Carson	65,015
McGuinn	54,609
Edwards	68,683
Purdum	82,556
Hammer	34,847
Richmann	61,208
Wagner	60,617

Monzo	40,542
Morgan	45,962
McEntee	53,301

Judgment is entered in favor of defendant Philadelphia Electric Company against all other members of the *Kurz* Class.

Counsel for plaintiffs is directed to submit an accounting of fees and costs to counsel for defendants immediately. If the parties are unable to agree upon a stipulation of fees and costs within 30 days, the parties are to submit their respective positions to the court.

The court's Order of May 9, 1995, is VACATED to the extent that it is inconsistent with this Order.

IT IS SO ORDERED.

Charles R Weiner

CHARLES R. WEINER

PHILADELPHIA ELECTRIC COMPANY, et al., petitioners, v. Herbert L. FISCHER, et al. and PHILADELPHIA ELECTRIC COMPANY, et al., petitioners, v. Donald R. KURZ, et al.

No. 93-631.

Dec. 6, 1993.

Case below, 994 F.2d 130; *Kurz v. Philadelphia Elec. Co.*, 994 F.2d 136.

The motion of Equal Employment Advisory Council for leave to file a brief as *amicus curiae* is granted. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Filed May 26. 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

92-1684

HERBERT L. FISCHER. Floyd L. Adams. James W. Alfreds. John I. Arena. Earl T. Atkinson. William Auve. Thomas F. Beck. William J. Bono. William A. Burwell. Jr.. Joseph C. Calabrese. Peter Carfagno. John B. Creighton. Ralph J. DaFermo. Sr.. Felix A. DeJoseph. Joseph A. DeVito. John T. Dougherty. John J. Dowling. Anthony Falasca. Eugene Fink. Rita J. Gesualdo. Jospeh L. Giorgio. Edwin Haines. Joseph T. Haley. Daniel J. Hefferan. Leo M. Hill. Robert J. Hoopes. Donald J. Hoy. Michael Hrynko. Donald Hughes. Carl M. Hunsicker. Neal Ireland. Walter D. Kraus. Charles E. Lindemuth. Robert F. Mahoney. Anthony D. Marchesani. Robert P.F. McCarron. Robert McCormick. Frank L. Mercadante. John P. Monaghan. David Monzo. John K. Moore. Joseph P. Moran. Mildred Pearl Morgan. Ralph E. Moyer. Herbert E. Mueller. James J. Nugent. Thomas E. Oetzel. Frank W. Persichetti. Sr.. Charles W. Plummer. Lewis Raibley. James J. Roddy. John J. Saunders. Louis F. Saunders. Nicholas J. Screnci. Joseph J. Semetti. John Steindl. William F. Thompson. Michael W. Trendler. Francis R. Tunney. Sr.. Herbert R. Walters. Richard S. Wilson. John H. Zimmer and Gerald A. Zimmerman.

Appellants.

v.

THE PHILADELPHIA ELECTRIC COMPANY:
JOSEPH F. PAQUETTE. JR.:
MICHAEL J. CROMMIE:
SERVICE ANNUNITY PLAN OF
PHILADELPHIA ELECTRIC COMPANY

Appellees.

Appeal from the United States District Court
for the Eastern District of Pennsylvania

(D.C. Civil No. 90-CV-8020)

Argued February 26, 1993

Before: MANSMANN, SCIRICA and FEINBERG,* *Circuit Judges.*

Filed May 26, 1993

Ronald L. Wolf (argued)
Martina W. McLaughlin
Litvin, Blumberg, Matusow & Young
210 West Washington Square
Philadelphia, PA 19106
COUNSEL FOR APPELLANTS

David H. Marion (argued)
Elizabeth A. Read
Kimberly H. Humes
Montgomery, McCracken, Walker & Rhoads
Three Parkway
Philadelphia, PA 19102
COUNSEL FOR APPELLEES

OPINION OF THE COURT

FEINBERG, Circuit Judge:

Herbert L. Fischer appeals on behalf of a class of former employees of the Philadelphia Electric Company (PECo or the Company) from an order of the United States District Court for the Eastern District of Pennsylvania denying his

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*Honorable Wilfred Feinberg of the United States Court of Appeals for the Second Circuit, sitting by designation.

motion for summary judgment and granting that of PECo.[1] Fischer alleged that the Company violated the Employee Retirement Income Security Act (ERISA). 29 U.S.C. § 1001 et seq. This appeal primarily requires us to decide whether summary judgment for PECo was proper on the record before us.

Background

Joseph F. Paquette. Jr. became PECo's Chief Executive Officer and Chairman of the Board in 1988. At that time. he was concerned that PECo's staffing levels. total wages and other costs were as high or higher than the average for the utility industry. In particular. PECo had a higher number of employees per customer than did its competitors. Apparently in response to these concerns. PECo requested a $549 million rate increase from the Public Utility Commission (PUC) in July 1989. PECo knew that the PUC would make its final decision on the rate increase in April 1990. In the meantime. the Company began to look for ways to reduce costs and hired an outside consultant. McKinsey & Company (McKinsey). to develop a long-range strategic plan for cost-reduction.

In October 1989. PECo learned that the PUC staff had recommended that PECo receive only $220 million of its requested increase. Despite this news. Paquette said in a speech in December 1989 on the "state of the company" that he was optimistic that PECo would get the entire increase it requested. In responding to a question after the speech as to whether an early retirement plan had been discussed as a cost-cutting option. Paquette answered that if the Company had to reduce the number of its employees. attrition would be the preferred means of doing so. possibly accelerated by an early retirement plan. Layoffs would be a last resort.

In March 1990. an administrative law judge issued an

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1. The named defendants are PECo. Joseph F. Paquette. Jr.. Michael J. Crommie. and PECo's Service Annuity Plan. an employee pension benefits plan as defined by ERISA. The defendants will be collectively referred to as "PECo."

interim ruling on PECo's requested increase, recommending that the Company be granted only $117 million, 21% of its total request. In the month before that ruling, PECo had formed a Cost Management Team to identify ways to reduce the Company's costs. Kenneth Lefkowitz, Manager of PECo's Compensation and Benefits Division, began outlining options to reduce the work force and contacted the actuarial firm of Towers, Perrin, Forster & Crosby (TPF&C) for assistance. TPF&C later sent Lefkowitz a confidential memorandum outlining three different methods of reducing the number of PECo employees, including an early retirement plan. PECo had considered such a plan in 1988, but it was never put into effect. Early in April 1990, McKinsey presented PECo's Board of Directors and top management with its list of ways to reduce costs. An early retirement plan was one of them.

The PUC issued its final order on April 19, 1990, granting PECo less than 50% of its total request. PECo responded swiftly to this decision. On that same day, Paquette wrote a letter to all employees, including those who had already announced their decision to retire, reporting the PUC's action and its financial impact on the Company. Even though no proposal had as yet been made to PECo's Board of Directors, Paquette indicated in his letter that he was going to "recommend that our Board approve an early retirement program." Paquette soon did so, and the plan, which was formally approved by the Board of Directors on May 25, provided certain options that benefitted those employees who elected to retire between July 15 and September 15, 1990.

While all this was going on, some of PECo's employees were thinking about retiring. It was PECo's practice to have prospective retirees notify the Company a few months before they wished to retire so that a retirement interview could be held. The purpose of the interview was to provide the employee with information about retirement, including pension amount and options for life insurance. During the period of time relevant here, the majority of these interviews were conducted by Senior Benefits Counselor Jack McCartney, although two other counselors would fill in on an "as-needed" basis. All of these employees were under the

supervision of Michael J. Crommie, the Director of the Benefits Division of PECo's Human Resources Department.

Six months before the early retirement plan was announced, rumors about it had already begun to circulate among PECo's employees. Prompted by these rumors, some prospective retirees asked the benefits counselors about the possibility that such a plan would be adopted. Until April 19, 1990, the date on which Paquette announced he would recommend a plan to the Board, the counselors answered that no plan was being considered, or that they had no knowledge of any plan. As far as the benefits counselors knew, they were telling the truth since the Company had not kept them abreast of any discussions taking place among senior management. Moreover, Director Crommie had instructed his counselors that if interviewees asked any questions, they were to be told "exactly what the plan called for at that time."

The plaintiffs in this case are PECo employees who retired on January 1, 1990, February 1, 1990, March 1, 1990 and April 1, 1990 and were therefore ineligible to obtain the benefits provided by the early retirement plan, but otherwise would have been eligible. Plaintiffs alleged that PECo breached its fiduciary duties under § 404 of ERISA; that PECo is estopped from denying the class members increased pension benefits; and that PECo engaged in discriminatory conduct in violation of § 510 of ERISA. After the class was certified, the parties cross-moved for summary judgment. The district court granted PECo's motion and denied plaintiffs' motion.

This appeal followed.

Discussion

Our review of an order granting summary judgment is plenary. "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "However, when the record is such that it would not support a rational finding that an essential element of the nonmoving party's claim or defense exists,

summary judgment must be entered for the moving party." *Turner v. Schering-Plough Corp.*, 901 F.2d 335, 341 (3d Cir. 1990) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

A. *Breach of Fiduciary Duty*

ERISA allows employers "to wear 'two hats.'" *Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402, 1416 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986), and PECo did so. It was both an employer and a plan administrator. As an employer, neither PECo nor its business decision to offer an early retirement program were subject to ERISA's fiduciary duties. *See, e.g., Payonk v. HMW Indus., Inc.*, 883 F.2d 221, 225 (3d Cir. 1989). As a plan administrator under ERISA, however, PECo was a fiduciary and was required, among other things, "to discharge [its] duties 'solely in the interests of the participants and beneficiaries.'" *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir.) (quoting 29 U.S.C. § 1104(a)(1)), *cert. denied*, 459 U.S. 1069 (1982).

Plaintiffs concede that PECO had the right as an employer to make the business decision of how much and when to enhance pension benefits, but argue that PECo also had an obligation under ERISA to tell the truth about such decisions when asked by plan participants. For this proposition, plaintiffs rely principally on *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154 (6th Cir. 1988), which, they assert, this court embraced in *Payonk v. HMW Indus., Inc.*, 883 F.2d 221 (3d Cir. 1989). According to plaintiffs, PECo breached its obligation through a "conspiracy of silence among senior management aimed at keeping confidential the considerable efforts being taken to implement an early retirement incentive program."

In *Berlin*, Michigan Bell announced that it would offer early retirement benefits to employees who retired between June 1 and July 31, 1982. This retirement "sweetener" was announced in June 1982, but plaintiffs there alleged that Michigan Bell had been considering such a plan as early as December 1, 1980. The plaintiffs in *Berlin* were employees of Michigan Bell who retired after December 1, 1980 but before June 1, 1982 and who were consequently unable to

take advantage of the sweetener. According to the *Berlin* plaintiffs, Michigan Bell breached its fiduciary obligations under ERISA by misleading them into believing that no early retirement plan was in the offing when such a plan was in fact being seriously considered. *See Berlin*, 858 F.2d at 1158.

The *Berlin* court recognized that a "purely business decision[]," such as a decision "to reduce the amount of unaccrued plan benefits" or to establish or terminate a plan, is not subject to ERISA's fiduciary duties. *Id.* at 1163. But the court rejected the view that "any communications or representations made prior to such a decision were also nonfiduciary." *Id.* The court held that "a fiduciary may not materially mislead those to whom the duties of loyalty and prudence described in 29 U.S.C. S 1104 are owed." *Id.* More specifically, it held that once Michigan Bell gave "serious consideration" to offering additional benefits, it was under an obligation as plan fiduciary "not to make misrepresentations, either negligently or intentionally, to potential plan participants concerning [the offering]." *Id.* at 1163-64; *accord Drennan v. General Motors Corp.*, 977 F.2d 246, 251 (6th Cir. 1992); *Baumgardner v. Inco Alloy Int'l, Inc.*, 746 F. Supp. 623, 627 (E.D. La. 1990); *cf. Barnes v. Lacy*, 927 F.2d 539, 544 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 372 (1991).

In *Payonk*, we considered a factual scenario akin to that presented in *Berlin*. HMW Industries (HMW) had two subsidiaries, referred to in *Payonk* as Metals and Wallace, both of which announced new employee benefits plans after being acquired by another corporation. Some Metals and Wallace employees opted to participate in these plans, rolling over their contributions from HMW's plan – the plan in which they had formerly participated – into the new ones. Later, HMW decided to terminate its plan, distribute the surplus and establish a new plan of its own. In accordance with federal regulations, HMW notified plan participants 10 days before the scheduled termination of the plan. *See Payonk*, 883 F.2d at 222-24.

Metals and Wallace employees who were ineligible to share in the surplus because they had rolled over their contributions before the HMW plan was terminated sued

HMW under ERISA, arguing that HMW was under a fiduciary duty to disclose the termination even before the 10-day period specified in the federal regulations. Unlike the plaintiffs in *Berlin*, however, the plaintiffs in *Payonk* made no claim that HMW had mislead them about its intention to terminate the plan. *See id.* at 226. Judge Garth's opinion in *Payonk* noted this crucial distinction and went on to hold that "an employer's lawful termination decision, *absent affirmative misrepresentations designed to mislead plan participants*, is not governed by ERISA's standards of fiduciary duties." *Id.* at 229 (emphasis supplied). None of the three opinions of the panel in *Payonk* expressed disapproval of the result in *Berlin* on the facts of that case.[2]

On its face, the present case appears closer to the facts of *Berlin* than to those of *Payonk*. In *Payonk*, the "record reveal[ed] no claims or assertions that HMW had misrepresented its termination decision." *Id.* at 226. In *Berlin*, by contrast, the "pivotal allegation" of the complaint was that Michigan Bell had "either knowingly or negligently made material misrepresentations" regarding a change to the plan during a period of time in which the change was under "serious consideration." *Berlin*, 858 F.2d at 1160, 1163. The same is true here. The entire basis for plaintiffs' complaint is that PECo, mainly through its benefits counselors, misrepresented what was really going on when members of the plaintiff class asked if the Company was considering an early retirement plan.

Yet, the district court here held that the facts of this case are more like those in *Payonk*, not *Berlin*. The court

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2. Judge Stapleton filed a concurring opinion. He join[ed] in affirming the district court . . . because [he] believe[d] that the information HMW and the other defendants [were] accused of having withheld was held by them in a fiduciary capacity for the corporation and its stockholders and not in a fiduciary capacity for plan participants." *Payonk*, 883 F.2d at 231. Accordingly, he could "perceive no basis for imposing a duty of disclosure" upon defendants. *Id.* at 232. Judge Mansmann dissented, concluding that "HMW had a duty under both § 404 of ERISA (29 U.S.C.A. § 1104) and § 16.2 of the HMW Plan to inform the participants, facing a decision of whether to withdraw from the Plan, of the impending termination." *Id.* at 236.

reached this conclusion because it found "no evidence of affirmative material misrepresentation by a fiduciary or non-fiduciary of PECo." Although we have no quarrel with the proposition, derived from *Payonk*, that a fiduciary may not make affirmative material misrepresentations, we believe that the district court's characterization of the record was incorrect.

Consider first the statements made by Michigan Bell in *Berlin*. For example, when Michigan Bell's Vice-President-Personnel "spoke to different groups" of lower-level managers and potential beneficiaries of an early retirement plan, he was consistently asked about the possibility of such a plan being implemented. Just as consistently, he would "respond[] with '[c]omments to the extent that there were no current plans to offer [an early retirement plan].'" *Id.* at 1159. Similarly, the "stock answer" given by the district manager of Michigan Bell's Benefits Office was that there were "'no plans for a[n] [early retirement plan] . . . .'" *Id.*

Now consider the statements allegedly made by PECo. One employee said in answer to interrogatories that when he asked Counselor McCartney (who conducted most of the retirement interviews) about an early retirement plan, McCartney "told [him] absolutely not for at least the next five years." Another indicated that McCartney "stated there was definitely nothing in the planning." According to another, McCartney said that "there was no word of any early out incentive plan (sweetener) but not to worry because Philadelphia Electric would take care of me if there was any change in the present retirement policy." Still another employee asked Director Crommie himself "whether there would be a sweetener package coming out on or about the time [he] would retire," to which "Crommie said there would be no such action." Finally, consider the statement in the record before us of one employee who retired on March 1, 1990, less than two months before Paquette's April 19 letter announcing the early retirement plan.

> If I had only known of the retirement package I would have waited to retire. I had 41 years of dedicated service to PECo. My family was just as dedicated day

> and night for 41 years. I feel that we should have been told of the sweetener. If I knew one was coming I would have waited to retire. I feel hurt and deceived that I was not given the opportunity of the early retirement package.

To our ear, the alleged responses given above echo those given by Michigan Bell in *Berlin*, and they suffice to preclude summary judgment.

Nonetheless, PECo argues that these communications cannot be characterized as "affirmative misrepresentations" because "when the benefits counselors . . . stated that they knew of no [early retirement] plan, their representations were correct." The counselors were telling the truth, PECo explains, because the Company had never told them it was considering an early retirement plan. Moreover, Director Crommie apparently decided to keep himself out of the loop: According to plaintiffs, Crommie said in his deposition, "[I]f management wanted me to know anything, they would have instructed me so." This explanation will not do, for the fiduciary obligations owed to the plan participants were owed by *PECo* as plan administrator. These obligations cannot be circumvented by building a "Chinese wall" around those employees on whom plan participants reasonably rely for important information and guidance about retirement.

As did the court in *Berlin*, we hasten to add that ERISA does not impose a "duty of clairvoyance" on fiduciaries. *Id.* at 1164. An ERISA fiduciary is under no obligation to offer precise predictions about future changes to its plan. Rather, its obligation is to answer participants' questions forthrightly, "a duty that does not require the fiduciary to disclose its internal deliberations nor interfere with the substantive aspects of the [collective] bargaining process." *Drennan*, 977 F.2d at 251 (citing *Payonk*, 883 F.2d at 226); *cf. Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747, 751 (D.C. Cir. 1990) ("This duty to communicate complete and correct material information about a beneficiary's status and options is not a novel idea."). A plan administrator may not make affirmative material misrepresentations to plan participants about changes to an employee pension benefits

plan. Put simply, when a plan administrator speaks, it must speak truthfully.

The content of the particular communications PECo allegedly made to members of the plaintiff class and whether such communications constituted affirmative misrepresentations are questions of fact properly left to the trier of fact on remand. *See Berlin*, 858 F.2d at 1164; *Drennan*, 977 F.2d at 251. Whether an affirmative misrepresentation was "material," however, is a "mixed question of law and fact." *Cf. Shapiro v. UJB Fin. Corp.*, 964 F.2d 272, 280 n.11 (3d Cir.), *cert. denied*, 113 S. Ct. 365 (1992). In the present context, a misrepresentation is material if there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision about if and when to retire. *Cf. Basic Inc. v. Levinson*, 485 U.S. 224, 232-41 (1988) (applying materiality standard to preliminary merger discussions); *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (elaborating concept of materiality in context of proxy solicitation). Included within the overall materiality inquiry will be an inquiry into the seriousness with which a particular change to an employee pension plan is being considered at the time the misrepresentation is made. All else equal, the more seriously a plan change is being considered, the more likely a misrepresentation, e.g., that no change is under consideration, will pass the threshold of materiality.

Summary judgment on "the question of materiality" is appropriate only if "reasonable minds cannot differ." *Id.* at 450 (internal quotations omitted). In the present case, there remain, among other things, open questions of how seriously PECo was considering an early retirement program at the times when the plaintiffs made the various inquiries that elicited the alleged misrepresentations. On the record before us, therefore, we believe it inappropriate to rule, as a matter of law, on the materiality of the misrepresentations allegedly made by PECo to the plaintiffs.

B. *Estoppel & Discrimination*

In addition to urging breach of fiduciary duty as a basis for recovery, plaintiffs seek to recover on a theory of

estoppel, arguing that "estoppel is available as a federal common law remedy under ERISA to recover benefits which the plaintiffs did not receive as a result of the defendants' misleading statements." Plaintiffs also seek to recover under § 510 of ERISA, which makes it "unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . ." 29 U.S.C. § 1140.

The district court concluded that neither estoppel nor § 510 could provide a basis for recovery, in part because it believed there was no genuine issue of material fact as to whether or not PECo had made affirmative material misrepresentations. For reasons given above, we think that there are such issues, which remain to be resolved in the district court. Therefore, we also remand on plaintiffs' claims of estoppel and discrimination without in any way suggesting a view on the merits.

For the foregoing reasons, the judgment of the district court granting summary judgment for PECo will be reversed and the case will be remanded for proceedings consistent with this opinion. For the same reasons, plaintiffs' request that we order the district court to enter summary judgment in their favor will be denied.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Filed May 26. 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

92-1685

DONALD R. KURZ. WILLIAM W. ANDERSON; JAMES W. BECK; WILLIAM T. BERGEN; CHARLES W. BOWDEN; WILLIAM H. BROWN; RICHARD CAHILL; ARMANDO L. CAPOFERRI; ROBERT C. DEMARCO; JAMES J. DILOLLE. SR.; VINCENT J. DIMAGGIO; JOHN J. DIVALENTINO. JR.; WILLIAM E. DRUMEL; VICTOR J. GIBIALANTE; FRANCIS T. GOLDEN; JAMES J. GRANGER; ELMER D. GREIM. JR.; JAMES H. HAIR; JOHN M. HOOPES; BENJAMIN J. KILIAN; GEORGE C. LINTHICUM; HUBERT A. MCKOWN. JR.; HENRY P. MCNAMEE; OLIVER K. MESSNER; ROBERT E. MILLER; JOHN A. MORSE; SAMUEL J. MULLEN; JOHN A. MUNLEY; STANLEY B. MYERS; JOHN J. NUSSPICKEL; JAMES W. PATTERSON; ALFRED B. SCHUMANN; JOSEPH C. SHARKEY; WILLIAM H. SMOYER; WOODROW E. SNYDER; JAMES D. SUTLIFF; EDWARD J. VETNER; DOMINIC C. VIGLIANESE; G. EARLE WATT; FREDERICK W. WINTERLING; JOHN R. YOUNG.

Appellants.

v.

THE PHILADELPHIA ELECTRIC COMPANY; SERVICE ANNUITY PLAN OF PHILADELPHIA ELECTRIC COMPANY; CHARLES L. FRITZ. J.L. EVERETT. III; JOHN H. AUSTIN. JR.

Appellees.

Appeal from the United States District Court
for the Eastern District of Pennsylvania

(D.C. Civil No. 91-CV-2271)

Argued February 26. 1993

Before: MANSMANN. SCIRICA and FEINBERG.* *Circuit Judges.*

Filed May 26. 1993

Ronald L. Wolf (argued)
Martina W. McLaughlin
Litvin. Blumberg. Matusow & Young
210 West Washington Square
Philadelphia. PA 19106
COUNSEL FOR APPELLANTS

David H. Marion (argued)
Elizabeth A. Read
Kimberly H. Humes
Montgomery. McCracken. Walker & Rhoads
Three Parkway
Philadelphia. PA 19102
COUNSEL FOR APPELLEES

OPINION OF THE COURT

FEINBERG. Circuit Judge:

Donald R. Kurz appeals on behalf of a class of former employees of the Philadelphia Electric Company (PECo or the Company) from an order of the United States District Court for the Eastern District of Pennsylvania denying his motion for summary judgment and granting that of PECo.[1] Kurz alleged that the Company violated the Employee Retirement Income Security Act (ERISA). 29 U.S.C. § 1001

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*Honorable Wilfred Feinberg of the United States Court of Appeals for the Second Circuit. sitting by designation.

1. The named defendants are PECo. Charles L. Fritz. J.L. Everett. III. John H. Austin. Jr.. and PECo's Service Annuity Plan. The defendants will be collectively referred to as "PECo."

et seq. The issues before us are similar to those raised in *Fischer v. Philadelphia Elec. Co.*, No. 92-1684, slip op. ____ (3d Cir. ____, ____, 1993), which we also decide today. This appeal, like the appeal in *Fischer*, primarily requires us to decide whether summary judgment for PECo was proper on the record before us.

Background

On behalf of its employees, PECo administers an employee pension benefit plan known as the Service Annuity Plan (the Plan), the same plan at issue in *Fischer*. To keep track of how the Plan compares to those of other utilities, PECo has from at least as early as 1977 participated in annual or bi-annual surveys of employee pension benefits offered by companies in the utility industry. These surveys were conducted by the Public Service Electric and Gas Company before 1986 and thereafter by PECo itself. At least once in the past, PECo amended the Plan to increase benefits after one such survey showed that PECo's benefits were comparatively low. The Pension Survey Report for the year 1986 would be issued sometime in 1987.

Throughout 1986 and into 1987, the Independent Group Association (IGA), a PECo employee organization, expressed concern to the Company about the Plan and pressed for improved benefits. In March 1987, Charles L. Fritz was Vice-President of Personnel and Industrial Relations and Chairman of the Service Annuity Board. Fritz responded to IGA's concerns and met with its Executive Committee to discuss the Company's wage and benefits package expected later in the year. In the course of that meeting, Fritz "remarked generally that the timing was right to make a significant change to the pension plan and that [the Company] had been looking at different ways of making a change to the pension [plan]." Discussions about proposed changes to the Plan continued at another meeting held the following month.

Meanwhile, as early as February 1987, the actuarial firm of Towers, Perrin, Forster & Crosby (TPF&C) had been put to work by PECo to evaluate a formula to change the Plan

to enhance benefits. In March, TPF&C Vice-President Donald Fleischer held a meeting at PECo to discuss the alternative formulas to be considered, some of which TPF&C started "pricing" or "costing out." Officials from TPF&C and PECo held what was apparently a final meeting around May 20, at which time various alternatives were discussed. On May 22, TPF&C sent PECo Vice-President Fritz a letter summarizing the firm's comments, recommendations and conclusions.

On that same day, PECo issued its 1986 Pension Survey Report comparing PECo's benefits to those of other utility companies. According to one official in PECo's Personnel and Industrial Relations Department, the Report showed that PECo "was below the midpoint and significantly below the midpoint for all management cases." In other words, compared to other utility companies, the pension benefits offered by PECo "had become fairly non-competitive." The Report concluded that "the time for a pension change . . . had arrived" and recommended adopting one of the proposals on which TPF&C had been working.

Based on this recommendation, Fritz requested and obtained permission from J.L. Everett, III, then PECo's Chief Executive Officer, and John H. Austin, Jr., then PECo's President and Chief Operating Officer, to recommend a change to the Board of Directors. Thereafter, a formal proposal to change the Plan was made to the Board and approved on June 22. The change was announced in the Company's official bulletin on July 2. The improvement to the Plan provided a substantial increase (approximately 17.6%) in the pension for those employees with over 40 years of service who retired at age 65.

In accordance with Company policy, all studies relating to the proposed change had been kept confidential, at least until the change was formally adopted. As in *Fischer*, this policy of confidentiality, which plaintiffs describe as a "conspiracy of silence," extended even to PECo's benefits counselors, whose job it was to provide prospective retirees with information about retirement benefits. Like the plaintiffs in *Fischer*, members of the plaintiff class here attended individual retirement interviews, the majority of which were conducted by Senior Benefits Counselor Jack

McCartney. During these interviews, some class members asked the counselors whether or not any change to the Plan was being considered. The benefits counselors, however, knew nothing of the change until it was announced. Indeed, they had been instructed "to give employees the facts as of [the time of the interview], and . . . not to speculate."

The plaintiffs in this case are former employees of PECo who retired between February 1 and June 1, 1987, and who were therefore ineligible to benefit from the change to the Plan. (Those employees who had scheduled retirement on July 1 were allowed to change their retirement date in order to take advantage of the change to the Plan, which became effective on August 1). As did the plaintiffs in *Fischer*, plaintiffs here allege that PECo breached its fiduciary duties under § 404 of ERISA; that PECo is estopped from denying the class members increased pension benefits; and that PECo engaged in discriminatory conduct in violation of § 510 of ERISA. After the class was certified, the parties cross-moved for summary judgment. The district court granted PECo's motion and denied plaintiffs' motion.

This appeal followed.

Discussion

Our review of an order granting summary judgment is plenary. "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "However, when the record is such that it would not support a rational finding that an essential element of the nonmoving party's claim or defense exists, summary judgment must be entered for the moving party." *Turner v. Schering-Plough Corp.*, 901 F.2d 335, 341 (3d Cir. 1990) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

We held in *Fischer* that a plan administrator, in response to inquiries from plan participants, "may not make affirmative material misrepresentations . . . about changes

to an employee pension benefits plan." *Fischer*, slip op. at 10. We held in addition that a company could not circumvent this obligation "by building a 'Chinese wall' around those employees on whom plan participants reasonably rely for important information and guidance about retirement." *Id.* at 10. It was thus irrelevant in *Fischer*, as it is here, that the responses PECo's benefits counselors gave to questions asked of them were truthful based on what the counselors themselves knew at the time. *Fischer* governs our approach in this case.

As in *Fischer*, the district court here granted PECo's motion for summary judgment because it found that plaintiffs "failed to produce any evidence" that PECo made affirmative material misrepresentations. For substantially the same reasons we gave in *Fischer*, we disagree.

PECo treated the members of the class in this case much as it did the class members in *Fischer*. For example, according to statements given in response to interrogatories, one plaintiff asked Counselor McCartney during a retirement interview in February 1987 "if anything was coming out in the August [retirement] package." McCartney "said no." Another employee recalled that in response to similar inquiries McCartney gave "a specific negative answer." Still another asked Vice-President Fritz — the PECo official responsible for recommending pension changes to PECo's CEO — about rumors of a change. Fritz said that "as far as he knew, there was nothing." This was sometime in March 1987, the same month in which Fritz remarked during his meeting with the IGA Executive Committee that "the timing was right to make a significant change to the pension plan."

Citing *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154 (6th Cir. 1988), PECo argues that "no plan could be said to have been under 'serious consideration' until it was proposed to the Board for discussion" on June 16, 1987 and that plaintiffs have presented "no evidence of any affirmative misrepresentation[s]" after that time. In *Fischer*, we held that a plan administrator cannot make affirmative *material* misrepresentations to plan participants in response to direct inquiries and that "[i]ncluded within the overall materiality inquiry will be an inquiry into the seriousness

with which a particular change to an employee pension plan is being considered at the time the misrepresentation is made." *Fischer*, slip op. at 11. Under the analysis in *Fischer*, PECo's claim is that an affirmative misrepresentation is not material unless it is made after "serious consideration" has been given to a change and, furthermore, that a change can be said to have been "seriously considered" only after it has been formally proposed to the Board of Directors.

We recognize that such a bright-line rule would be easier to administer than the materiality standard embraced in *Fischer*. On the other hand, as the Supreme Court noted in another context, "[a]ny approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive." *Basic Inc. v. Levinson*, 485 U.S. 224, 236 (1988). Tying "serious consideration" to a single objective event in the present context would work unfairly in some instances.

In *Fischer*, for example, PECo's proposed rule would have meant that the letter, sent by the Company CEO to all employees announcing that an early retirement plan would soon be proposed to the Board of Directors, could not have amounted to "serious consideration" since no proposal had as yet been submitted to the Board. Yet in that case PECo took it upon itself to voluntarily notify its employees about the anticipated change even before making a formal proposal to the Board. To us, this action suggests that PECo itself believed that fairness required not only that it answer employee inquiries truthfully but also that it actually disclose its plans without any specific inquiry, even though the bright-line rule it suggests here would not have been satisfied.

Though we reject the rule PECo proposes, we emphasize that PECo is entitled to argue to the trier of fact, among other things, that the statements it allegedly made were not material because, at the time those statements were made, the amendment to the plan was not under serious consideration. It must be kept in mind, however, that the ultimate inquiry is whether there is a "substantial likelihood" that the affirmative misrepresentation "would

mislead a reasonable employee in making an adequately informed decision about if and when to retire." *Fischer*, slip op. at 11.

In any event, the statements described above, like those in *Fischer*, are sufficient to preclude summary judgment as to whether or not PECo made any affirmative misrepresentations and as to whether or not those misrepresentations, if any, were material. Because the district court's decision to grant PECo's summary judgment motion on each of plaintiffs' three claims was based in part on its erroneous view that there was no evidence that PECo made affirmative material misrepresentations, summary judgment was improper. As in *Fischer*, we do not express any view on the merits of any of plaintiffs' claims.

Accordingly, we will reverse the judgment of the district court granting summary judgment to PECo and will remand the case for proceedings consistent with this opinion. For the same reasons, plaintiffs' request that we order the district court to enter summary judgment in their favor will be denied.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HERBERT L. FISCHER, et al.	:	
	:	
v.	:	C.A. NO. 90-8020
	:	
PHILADELPHIA ELECTRIC CO., et al.	:	
	:	
	:	
DONALD R. KURZ, et al.	:	
	:	
v.	:	C.A. NO. 91-2771
	:	
PHILADELPHIA ELECTRIC CO., et al.	:	

WEINER, J. July 27, 1992

MEMORANDUM OPINION AND ORDER

Introduction

Plaintiffs in these two consolidated matters, Donald R. Kurz, et al. and Herbert L. Fischer, et al. are former employees of the Philadelphia Electric Company ("PECO"). They have brought these actions on behalf of classes of like situated former PECO employees to recover additional pension benefits. Named as defendants in the actions are PECO, its pension plan and its key employees charged with making pension plan decisions at the relevant times of these two lawsuits. The actions are based upon the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1101, et seq. and arise out of changes, made at two different time periods, to the PECO pension plan. Plaintiffs claim the defendants: violated fiduciary duties under ERISA, are equitably estopped under ERISA from denying the plaintiffs increased pension benefits, and have engaged in discriminatory conduct in violation of § 510 of ERISA, 29 U.S.C. § 1140.

PROCEDURAL HISTORY

Although the facts alleged by plaintiff Kurz occurred first in time, plaintiff Fischer's complaint was first to be filed. The Kurz action was then consolidated with Fischer for coordinated proceedings. On August 29, 1991, the court certified a class in the Kurz action consisting of all those former employees of PECO who retired from the company from January 1987 through and including June 1, 1987. The court certified a class in the Fischer action consisting of all those former employees of PECO who retired on January, February, March or April 1, 1990, who would have reached age 50 by December 31, 1990 and who would have completed five or more credited years of service.

Presently before the court are the parties' cross-motions for summary judgement. The motions are based upon lengthy joint stipulations of facts prepared for each matter, supplemented by deposition transcripts. Briefly, the disputes in these matters concern the duties of company officials to advise soon to retire employees about possible changes in retirement benefits. For the reasons which follow, we find the plaintiffs have failed to prove to state a cause of action against the PECO defendants involving conduct violative of ERISA. Accordingly, the motions of the PECO defendants in these cases will be granted and the motions of the plaintiff classes will be denied.

FACTS

The parties in *Fischer* stipulate to the following facts for purposes of their motions for summary judgement:

1. Philadelphia Electric Company ("PECO") maintains a Service Annuity Plan for the benefit of its employees.

2. The Service Annuity Plan is an employee pension benefit plan as defined by the Employee Retirement Income Security Act ("ERISA).

3. Under the terms of the Service Annuity Plan PECO is the Administrator of the plan, and may delegate its duties as administrator. [*Paquette Deposition,* p. 13].

4. Named plaintiffs (hereinafter "plaintiffs") are former employees of PECO, and seek to represent a purported class

of employees who retired January 1, 1990, February 1, 1990, March 1, 1990 or April 1, 1990; who would have reached age 50 on or before December 31, 1990; and who would have completed five or more years of credited service under the company's Pension Plan as of December 31, 1990, had they still been employed by PECO at that time.

5. Plaintiffs are participants in the Service Annuity Plan (effective January 1, 1987, as amended August 1, 1987) (hereinafter "Annuity Plan") provided to PECO employees. Plaintiffs retired in accordance with the Annuity Plan and are receiving monthly benefit payments in accordance with that Annuity Plan.

6. The named plaintiffs do not claim that they are being or have been denied the benefits to which they are and were entitled under the Service Annuity Plan that was in effect at the time they retired.

7. In 1989 and early 1990,

- Joseph F. Paquette, Jr. was the Chief Executive Officer and the Chairman of the Board of PECO;
- James Durham was the General Counsel for PECO; from October 1989 to October 1990 he was the acting Vice President of Human Resources;
- M. Joseph Friderichs was the Manager of Corporate Planning and Analysis of PECO;
- Kenneth Lefkowitz was the Manager of the Compensation and Benefits division of PECO;
- Michael J. Crommie was the Director of the Benefits Division of the Human Resources Department of PECO;
- Frederick J. Beaver was an Administrative Assistant in the Benefits Division of the Human Resources Department of PECO until September 1989; in September 1989 he was named Supervisor in the Benefits Division of the Human Resources Department;
- Jerry Wagner was a Staff Assistant in the Benefits Division of the Human Resources Department of PECO;
- Jack McCartney was the Senior Benefits Counselor in the Benefits Division in the Human Resources Department of PECO.

[*McCartney Deposition*, 7/17/91, pp. 17-18].

8. Mr. Paquette is and was (since he became CEO) in charge of long-range strategic planning. [*Paquette Deposition*, p. 35].

9. Since 1988, when he became CEO, Mr. Paquette has been concerned about PECO's staffing levels, total wages and other cost elements, all of which were high or higher than average for the industry. PECO had a higher number of employees per customer than was average for the industry. [*Paquette Deposition*, p. 19].

10. PECO conducts periodic manpower studies as part of its overall performance evaluation of the company. [*Friderichs Deposition*, p. 16].

11. From 1982 to 1991 Joseph Friderichs was responsible for conducting these periodic manpower studies. [*Friderichs Deposition*, p. 16].

12. PECO's manpower studies were based, in part, on studies that compared staffing levels among utilities throughout the region. [*Friderichs Deposition*. p. 16].

13. In July of 1989 PECO requested a $549,000,000 rate increase from the Public Utility Commission ("PUC').

14. Thomas Hill was the Controller of Philadelphia Electric Company in 1990. In 1989, his primary responsibility was handling the proceedings before the PUC for a rate increase which was filed in July, 1989. [*Hill Deposition*].

15. Thomas Hill was aware in July, 1989, when the initial rate increase request papers were filed with the PUC that the final decision regarding the rate increase request would be made by the PUC in April, 1990. [*Hill Deposition*].

16. On or about August 4, 1989, Mr. Paquette asked Mr. Friderichs to suggest consultants to assist in a strategic planning effort for Philadelphia Electric Company. [Bates Document No. 003638; *Paquette Deposition*, p. 161].

17. In October 1989 PECO learned that the PUC staff had recommended that PECO receive only $220,000,000 of the requested increase. [*Paquette Deposition*, p. 44].

18. In November 1989 PECO hired McKinsey and Company, a consulting firm, to assist in the development of a new

corporate strategy, which included an overall evaluation of PECO, a long-term strategic plan for cost-reduction. [Bates Document No. 3637].

19. In or around November 1989, Joseph Fridericks was put in charge of coordinating the McKinsey study, at the request of Joseph Paquette. [*Fridericks Deposition,* p. 25].

20. Over the next several months McKinsey evaluated and identified cost reduction opportunities throughout the company, including manpower, materials management, work design, labor management, contractors, fuel, capital expenditures and other areas of potential cost savings. With respect to its analysis of staffing levels, McKinsey considered, among other things, comparisons of staffing levels among utilities within the region.

21. In December, 1989, Joseph Paquette held some "state of the company" speeches in which he discussed where the company was headed in the future, and answered employee questions. Mr. Paquette discussed the rate increase request, and stated that he was optimistic that the Company would get the request. In response to a question posed by an employee about whether an early retirement plan had been discussed as a cost cutting option, Mr. Paquette responded that if PECO decides they have to reduce the number of people in the company, the priorities would be to reduce employees by attrition, possibly an early retirement program. The last choice would be lay-offs. [Bates Document No. 003227].

22. During the meeting held by Mr. Paquette on December 13, 1989 at approximately 1:30 p.m., Mr. Paquette made the following comments in response to a question by an employee as to whether management had any plan if PECO did not get the rate increase requested from the PUC:

> "Well, no, we don't have a specific plan at this time because we're not sure — if we don't get enough of a rate increase, we're not sure exactly where we're going to end up on that rate curve and we'll have time when we get the PUC's order — incidentally, the commission will make a final decision by April 20, but we will get an earlier indication around the middle of February because at that

time the administrative law judges who are hearing the case, the rate case, will submit their recommendation to the PUC as to how much of a rate increase we should get and generally the PUC's final decision is somewhat very close to the ALJs' report. So that February 15 report will be very critical in giving us a pretty good indication of what we're going to get. So after that time we'll start looking at what our alternatives are." [*Paquette Deposition*, pp. 63-64].

23. In *Perspectives* dated December 22, 1989, James Durham stated that PECO expected to receive a ruling by the PUC in mid-April of 1990.

24. In accordance with PECO's policy for "efficient and economic work force distribution," it has been PECO's long-standing corporate policy to avoid layoffs wherever possible. One of the steps to be taken to avoid layoffs according to the PECO policy is "an early retirement offer, or a selective termination allowance [which] will be considered and, if practicable, implemented." [Exhibit Beaver-2].

25. Mr. Paquette's "state of the company" speech was published in *Perspectives* on February 2, 1990.

26. On January 24, 1990, McKinsey and Company presented an initial progress report based upon their initial diagnosis including factual, statistical diagnoses and interviews with a number of officers and management people. The initial report was presented to senior management. [*Friderichs Deposition*, pp. 43-44; Bates Document Nos. 002217-002261].

27. Joseph Friderichs was aware before January, 1990 that comparative studies indicated PECO had too many employees in specific departments. [*Friderichs Deposition*, pp. 47-48].

28. In February 1990, Thomas Hill, PECO's Controller, was put in charge of the Cost Management Team, which grew out of PECO's long-term strategic planning. The Cost Management Team worked with McKinsey towards the goal of identifying means of reducing PECO's costs. [*Friderichs Deposition*, p. 52].

29. On March 1, 1990, the Administrative Law Judges issued an interim decision on PECO's rate increase applica-

tion. In that decision, the ALJs recommended to the PUC that PECO receive only $117 million, or 21% of the full amount of its requested increase. This decision was reported in *Perspectives* on March 2,.1990. [*Perspectives* March 2, 1990].

30. In the March 16, 1990 edition of *Perspectives*, it was reported that immediately following the March 1, 1990 recommendation of the ALJs to the PUC, PECO took a number of interim steps designed to intensify its cost control efforts. [Bates Document No. 003795].

31. On March 20 or March 25, 1990, Mr. Friderichs prepared a memorandum comparing Philadelphia Electric Company employees by major function or department to the median number of employees as documented by the study of an unrelated company, known as TBS. A copy of this memorandum was provided to Mr. Paquette and senior officers. [*Friderichs Deposition*, pp. 71-78]. [Bates Document Nos. 3252-3257].

32. On March 27, 1990, senior management (including Joseph Paquette) met with the Cost Management Team and a representative of McKinsey to discuss various means of achieving a cost reduction of somewhere between $110,000,000 and $220,000,000. [*Friderichs Deposition*, pp. 83, 86; Bates Document Nos. 2420-2505].

33. A document dated March 27, 1990 contains McKinsey's analysis of the numerical impact of reductions of various staffing levels and identifies a number of options for achieving those reductions. [*Friderichs Deposition*, p. 32]

34. Mr. Hill prepared a memorandum in connection with the March 27 meeting of the cost management team in which he discussed a potential for a $110-$220 million per year expense reduction. [Bates Document No. 003261].

35. On March 30, 1990, Larry Kanarch of McKinsey sent a letter to Mr. Friderichs concerning the issues for the upcoming cost reducing meeting with senior management. Questions regarding headcount were raised. [Bates Document Nos. 3281-3282].

36. As of March 30,1990, Mr. Friderichs, the Manager of Corporate Planning and Analysis, prepared an analysis of the PECO personnel and contractor count, as compared to the

June, 1989 study by TBS. Mr. Paquette reviewed a copy of this comparison report. [*Paquette Deposition*, p. 137; Bates Document Nos. 003263-003267].

37. At an April 2, 1990 meeting with senior management, McKinsey reported on its progress in strategic planning. [*Friderichs Deposition*, p. 90; Bates Document No. 3274].

38. Mr. Friderichs prepared a memorandum to Joseph Paquette and others, dated April 3, 1990, comparing PECO's manpower to the manpower of other "electric only" utilities. [*Friderichs Deposition*, pp. 98-102; Bates Document No. 003275].

39. On April 4, 1990, McKinsey gave a progress report to PECO's Board of Directors and presented possibilities for improving efficiency and reducing the annual rate of expenditures by $100,000,000 by the end of December 1991. [*Friderichs Deposition*, p. 105; Bates Document No. 3286]. Included in McKinsey's list of possibilities was an early retirement opportunity for all staff personnel.

40. On April 7, 1990, McKinsey and the Cost Management Team presented to the vice presidents substantially the same information that they had presented to the senior officers on April 2nd and to the Board of Directors on April 4th. [*Friderichs Deposition*, pp. 59, 64).

41. As of April 7, 1990, Mr. Paquette indicated that on April 20 he would announce to employees the proposed programs for achieving the $100,000,000 expense reduction. [*Friderichs Deposition*, p. 126].

42. As of April 7, 1990, Mr. Paquette had requested that there be no discussion at that time with employees regarding the changes suggested by the McKinsey cost management team because, as of that date, the Board of Directors had made no decisions and he did not want to cause undue speculation by employees. [*Friderichs Deposition*, pp. 62-65, 127; Bates Document No. 002650].

43. On April 19, 1990, PECO's senior management met with the Cost Management Team and with representatives of McKinsey.

44. On April 19, 1990, the PUC issued its final order on PECO's rate request, granting PECO less than 50% of the amount it had requested.

45. On April 19, 1990, Mr. Paquette wrote a letter to all employees, including those who had already announced their decision to retire, which referred to The Public Utility Commission's denial of PECO's rate request, and the financial impact of that denial. He stated that he was going to "recommend that our Board approve an early retirement program."

46. Mr. Lefkowitz was put in charge of developing the early retirement incentive plan. [*Paquette Deposition*, p. 102].

47. Mr. Lefkowitz had already contacted Towers, Perrin, Forster & Crosby ("TPF&C"), an actuarial firm, on March 12, 1990 to discuss options for reducing the work force. [*Lefkowitz Deposition*, p. 36].

48. Around mid-March, 1990, Mr. Lefkowitz had two or three telephone conversations with William Murdoch, Jr., Vice President of TPF&C, regarding alternative methods for a reduction in force, including early retirement incentives. [*Lefkowitz Deposition*, pp. 35-36].

49. Mr. Lefkowitz testified that he began outlining options for reducing the work force as a result of the ALJs' March 1 interim decision, knowing that an adverse final order could have a negative impact on the company.

50. Mr. Lefkowitz did not begin working for PECO until February 1989. [*Lefkowitz Deposition*, p. 1].

51. On March 28, 1990, Mr. Murdoch of TPF&C sent a confidential memorandum to Kenneth Lefkowitz outlining three alternative "open window" programs for a proposed staff reduction in response to the telephone conversations Mr. Lefkowitz had had with TPF&C. [*Lefkowitz Deposition*, pp. 91-92; Bates Document Nos. 003450-003475].

52. At the end of March, 1990, Mr. Lefkowitz prepared a handwritten document entitled RIF (meaning reduction in force), which he sent to Mr. Paquette on April 2, 1990. [*Lefkowitz Deposition*, pp. 24-25, 30-33, 57-58; Bates Document Nos. 001894-001901].

53. Mr. Lefkowitz reviewed his reduction in force considerations and models with Mr. Durham before submitting these materials to Mr. Paquette. [Bates Document No. 001894].

54. One of the options for work force reduction proposed by TPF&C on March 28, 1990, was a voluntary improved early retirement pension benefit plus special severance pay allowance. TPF&C and PECO had considered the same options in June, 1988. [Bates Document No. 003453].

55. PECO had offered a few early retirement programs before 1990. [*Paquette Deposition*, p. 39]. The last early retirement program was offered by the company in 1978.

56. Mr. Lefkowitz did not talk to Michael Crommie about his discussions with TPF&C in the spring of 1990. [*Lefkowitz Deposition*, p. 38].

57. Mr. Lefkowitz did not consider letting prospective retirees know about the "possibility" that PECO might implement an early retirement program. [*Lefkowitz Deposition*, p. 40].

58. In his April 2 memo, Mr. Lefkowitz notes that lay-offs are still a possibility. [Bates Document No. 1894].

59. Between March and June 1988 TPF&C had discussed with PECO possible early retirement options. [Exhibit Paquette-4].

60. On May 18, 1988, C.L. Fritz, the Vice President of Personnel and Industrial Relations Department of Philadelphia Electric Company, sent a memorandum to R.G. Gilmore, Senior Vice President of Philadelphia Electric Company regarding work force reductions and outlining a recommended program for a pension plan enhancement ("sweetener").

61. In June, 1988, Philadelphia Electric Company was considering an early retirement program to become effective January 1, 1989. [Exhibit TPF&C-15; *Fleischer Deposition*, p. 85]. That program never went into effect.

62. In June, 1988, Mr. Fleischer of TPF&C was asked by Philadelphia Electric Company to provide a cost analysis of the early retirement program being considered. [*Fleischer Deposition*, pp. 86-87; Exhibit TPF&C-15].

63. On June 6, 1988, Donald Fleischer of TPF&G sent to Mr. McKinsey, the Manager of Personnel and Industrial Rela-

tions at Philadelphia Electric Company, a letter enclosing tables concerning the estimated costs for early retirement sweeteners. [Exhibit TPF&C-16; *Fleischer Deposition*, p. 96].

64. On June 10, 1988, Donald Fleischer of TPF&C, sent a letter to John McGinley of PECO providing more detail on the calculations of cost for the potential early retirement sweetener. [Exhibit TPF&C-19; *Fleischer Deposition*, p. 117].

65. On April 13, 1990, Donald Fleischer of TPF&C sent Kenneth Lefkowitz the results of a telephone survey of 145 companies regarding the prevalence of "window plans" (that is, early retirement programs open for a specific period of time). [*Lefkowitz Deposition*, pp. 93-9; Bates Document Nos. 003476-003481].

66. After April 19, 1990, Michael Crommie had an ancillary role in developing the early retirement program. [*Lefkowitz Deposition*, p. 51].

67. On April 23, 1990, Mr. Paquette proposed to the Board of Directors that PECO adopt a plan to reduce costs by $100,000,000, including reducing management salaries and directors fees, advising, contributions and offering early retirement. [*Paquette Deposition*, p. 78].

68. On April 26, 1990, Michael Crommie sent letters to employees who had completed a retirement application and had not yet retired, enclosing the April 19 letter from Mr. Paquette, "to ensure that [they were] aware of an early retirement program that [would be] announced in the latter part of May."

69. On May 4, 1990, Kenneth Lefkowitz sent a memorandum to Mr. Paquette, Mr. McNeill, Mr. Gilmore and Mr. Durham containing various early retirement incentive proposals. [*Paquette Deposition*, p. 105; Bates Document Nos. 1799-1807].

70. On May 25, 1990, the Board of Directors approved Management's proposal to amend the Service Annuity Plan to provide a Special Limited Early Retirement benefit.

71. On May 25, 1990, the Board of Directors also approved the proposal to adopt the Service Completion Plan.

This plan provided a one time severance payment to those employees who qualified under the terms of the Service Completion Plan.

72. In order to be eligible to elect to participate in the Special Retirement and Service Completion Plan, one had to have been employed as of the effective date of the Plan, reached 50 years of age or more and completed five or more years of credited service by December 31, 1990.

73. Employees who were eligible could elect one of three alternatives during the window period of July 15, 1990 through September 15, 1990.

74. The alternatives were as follows:

(a) continue with their current career and retirement plans by electing not to take the Special Retirement Plan;

(b) elect the Special Retirement Plan with an improved pension benefit and retire by October 1, 1990; or

(c) elect the Special Retirement Plan and the Service Completion Plan, receiving an improved pension benefit as well as nine month's salary paid in a lump sum. This retirement would occur on or before December 1, 1992, at a time determined by management.

75. Had plaintiffs been employed by PECO when this plan came into effect, plaintiffs would have qualified to elect from the options set forth in the preceding paragraph.

76. Because the plaintiffs were not employees at the time the Plan went into effect, they were not eligible to elect to participate in the Plan.

77. All of the named plaintiffs had retired by April 1, 1990 — before Mr. Paquette announced his intention to recommend that the Board consider approving an early retirement incentive.

78. On May 31, 1990 Mr. Paquette wrote to all employees announcing the decision of the Board of Directors to implement an early retirement program. [*Paquette Deposition*, p. 92].

79. On June 19, 1990, Mr. Fleischer sent a letter to Mr. Lefkowitz regarding the cost implications of the Retirement

Incentive Plan. 3758-3760. This document sets forth cost numbers for the version of the plan that was adopted by the Board of Directors on May 25, 1990.

80. In July of 1990, PECO mailed to employees eligible to participate in the Special Retirement and Service Completion Plan, a packet of information concerning the details of the plan.

81. In 1989 and 1990, Jack McCartney's primary responsibility as Senior Benefits Counselor for Philadelphia Electric Company was working with pension calculations and interviewing retirement applicants. [*McCartney Deposition*, 7/17/91, p. 14].

82. In 1989 and 1990, the steps a PECO employee would undergo in order to retire included the following: notifying his employing officer that he wished to retire; the employing officer would then write a letter to the Vice President notifying him of the employee's desire to retire and the date of retirement; the Vice President would send a letter to the Benefits Division advising of the employee's desire to retire and the date and request that the process be started; the Benefits Division would pull the employee's service record, run a pension calculation for him, contact the employee to schedule a retirement interview; a retirement package would be assembled and a one-on-one interview with the employee and his spouse would be held. [*McCartney Deposition*. 7/17/91, pp. 27-28].

83. The purpose of the retirement interview was to provide the PECO employee with information about his retirement, including the pension amount and options for life insurance. [*McCartney Deposition*, 7/17/91, p. 28].

84. It was part of Mr. McCartney's job to answer questions posed by the PECO employee concerning his retirement options. [*McCartney Deposition*, 7/17/91, p. 29].

85. The retirement interview generally was scheduled to take place approximately three months before the PECO employee ended his active service with the company; that is, many employees would end active service with the company

and take their last period of vacation immediately before their final retirement date. [*McCartney Deposition*, 7/17/91, pp. 31-32].

86. A Philadelphia Electric Company employee who has applied for retirement remains an employee of the company until his actual retirement date, even if he is on vacation and has ended active service with the company. [*McCartney Deposition*, 7/17/91, p. 32].

87. In 1989 and early 1990, Mr. McCartney was the person within the Human Resources Department, Benefits Division, who conducted the majority of the retirement interviews. [*McCartney Deposition*, 7/17/91, pp. 35-36].

88. During 1989 and early 1990, Jerry Wagner and Jill Lobb also conducted retirement interviews, if Mr. McCartney was unavailable. [*McCartney Deposition*, 7/17/91, p. 35-36].

89. For at least six months before April 19, 1990, there were rumors among employees of a possible early retirement program. [*McCartney Deposition* 7/17/91, pp. 43-44].

90. Prior to the April 19 announcement, in response to the questions from employees concerning rumors about potential changes to the pension plan, Mr. McCartney generally would respond: I have no idea. I heard the same rumors from other people. There is nothing official announced and as far as I know there is nothing that I can tell you." [*McCartney Deposition*. 7/17/91, p. 49].

91. In 1989 and 1990, a Philadelphia Electric Company employee had the right to change their retirement dates at any time prior to retirement date. [*McCartney Deposition*, 7/17/91, p. 34].

92. Mr. Crommie retired on December 31, 1990 under the Special Retirement and Service Completion Plans.

93. . Mr. McCartney retired on November 1, 1990 under the Special Retirement and Service Completion plans.

94. Mr. Friderichs retired from Philadelphia Electric Company on August 1, 1991 under the Special Retirement and Service Completion Plans. [*Friderichs Deposition*, p. 8].

95. The number of people who retired from January 1, 1990 through April 1, 1990 was typical of the number of people who usually retire in that time period. [*McCartney Deposition*. 7/17/91, p. 84].

96. Mr. Paquette was aware that the early part of the year was a peak time for retirements. [*Paquette Deposition*, pp. 54-55].

97. At Philadelphia Electric Company, February 1 and March 1 of each year was a peak period of time when people would retire. [*Crommie Deposition*, pp. 78-79].

98. Prior to April 19, 1990, in response to questions regarding an early retirement incentive, Benefits Division staff answered that they had no knowledge of any plan that was being implemented.

99. From 1984 through approximately December, 1988, Jill Lobb was a Senior Benefits Counselor at Philadelphia Electric Company. In December, 1988, her position changed to Benefits Administrator. [*Lobb Deposition*, pp. 14-16].

100. In 1988 through 1990, Jill Lobb conducted retirement interviews on an as-needed basis. [*Lobb Deposition*, pp. 14-17].

101. The Benefits Division routinely receives telephone calls from employees asking whether or not there is any information about potential changes to the pension plan. [*Lobb Deposition*, pp. 27-28].

102. Mrs. Lobb was told by Mr. Crommie to respond very honestly and say "I don't know" to questions she would receive from employees as to whether or not there were any potential changes to the pension plan. [*Lobb Deposition*, p. 28].

103. On August 11, 1986, Philadelphia Electric Company adopted a policy for the "Efficient and Economic Work Force Distribution" as set forth in the memorandum from Charles L. Fritz dated August 11, 1986.

104. Jerry Wagner was a staff assistant in the Benefits Division at Philadelphia Electric Company who conducted some retirement interviews in 1989 and early 1990. Mr. Wagner had been instructed by Mr. Crommie that if an employee asked whether or not there were any potential changes to the pension plan being contemplated, he was to tell them "exactly

what the plan called for at that time." Mr. Wagner did not know whether any changes were coming about." [*Wagner Deposition*, pp. 23-27].

105. The "Efficient and Economic Work Force Distribution" policy as set forth in the memorandum dated August 11, 1986 was in effect as an official policy of Philadelphia Electric Company in 1988. [*Beaver Deposition*, p. 110].

The parties in Kurz stipulate to the following facts for purposes of their Motions for Summary Judgment:

1. Philadelphia Electric Company maintains for the benefit of its employees the Service Annuity Plan, an employee pension plan as defined by the Employee Retirement Income Security Act.

2. The Service Annuity Plan is administered by Philadelphia Electric Company.

3. Plaintiffs are former PECO employees, who retired between February 1, 1987 and June 1, 1987.

4. The Service Annuity Plan was in effect at the time of plaintiffs' retirement.

5. All named plaintiffs currently are receiving pension benefits from the Service Annuity Plan, effective January 1, 1987, which was in effect at the time of their retirements.

6. After plaintiffs retired, the Service Annuity Plan was amended, which was announced by an Official Bulletin on July 2, 1987; the amendment was effective August 1, 1987.

7. Had plaintiffs been employed by PECO when this amendment to the Service Annuity Plan came into effect, plaintiffs would have qualified for the enhanced pension benefits.

8. Defendant J. L. Everett III ("Everett") was the Chairman of the Board and Chief Executive Officer at PECO from 1982 until his retirement on August 1, 1988.

9. Defendant John H. Austin, Jr. ("Austin") was the President and Chief Operating Officer at PECO from 1982 until his retirement on June 1, 1988.

10. Defendant Charles L. Fritz ("Fritz") was the Vice-President of Personnel and Industrial Relations at PECO from July of 1977 until his retirement on July 1, 1988.

11. In 1987, John McGinley ("McGinley") was the Manager of the Personnel and Industrial Relations Department.

12. In 1987, Ronald Downs ("Downs") was the Manager of the Industrial Relations Department.

13. In 1986 and 1987, Michael Crommie ("Crommie") was the Director of the Employee Service Division at Philadelphia Electric Company.

14. In 1985 through September, 1989, Frederick J. Beaver ("Beaver") was the Administrative Assistant in Personnel and Industrial Relations (which later became known as Human Resources). He reported directly to Michael Crommie. In September, 1989, Beaver was named Supervisor of the Department.

15. In 1986 and 1987, John J. McCartney ("McCartney") was a Staff Assistant in the Benefits Division of the Personnel and Industrial Relations Department at Philadelphia Electric Company. Mr. McCartney conducted the majority of the retirement interviews at that time.

16. In 1987, Jerry Wagner ("Wagner") was a Staff Assistant in the Benefits Division.

17. From 1984 through approximately December, 1988, Jill Lobb ("Lobb") was a Senior Benefits Counselor in the Benefits Division. Her main responsibility was to administer the 401K plan.

18. In 1987, Donald Fleischer ("Fleischer") was Vice President of Towers, Perrin, Forster & Crosby ("TPF&C"), a consulting firm that performed actuary work, among other things, for PECO.

19. In 1986 and 1987, William Murdoch ("Murdoch") was a Vice President at TPF&C.

20. From at least as early as 1977, on an annual or bi-annual basis, PECO participated in surveys that compared the employee pension benefits of companies in the utility industry. [*Fritz Deposition*, pp. 41-42].

21. These surveys assessed and ranked the utility companies' respective pension benefits. [*Fritz Deposition*, pp. 41-44].

22. For many years, this survey was performed by the Public Service Electric and Gas Company ("PSE&G"). Survey results from the 1983 survey were released to PECO in February of 1984. [Bates Document Nos. 116-119].

23. Mr. Beaver was one of the employees in the Benefits Department that would review the comparative studies performed by PSE&G. [*Beaver Deposition*, pp. 12-13].

24. Previously, PECO had amended its pension formula to increase benefits, effective as of January 1, 1982, after a survey by PSE&G indicated that PECO's pension benefits were low, compared to other companies in the industry.

25. In 1986, after PSE&G had decided to discontinue the survey, PECO assumed the task of compiling the survey, because it provided valuable information. PECO adopted the same format and approximately the same timetables as had previously been in the surveys undertaken by PSE&G. [Bates Document Nos. 072, 104-111].

26. Mr. Beaver was in charge of implementing the first comparative pension benefit study conducted by PECO in 1986 and authored the 1986 Pension Survey Report which was issued May 22, 1987. [*Beaver Deposition*, pp. 21-22, 29-30].

27. In approximately February, 1987, Beaver received the data from the other utilities participating in the 1986 pension study. [*Beaver Deposition*, pp. 35-36].

28. As a result of the 1986 pension survey, Mr. Beaver concluded that out of 23 comparison companies, PECO's position was below the midpoint and significantly below the midpoint for all management cases; PECO's position had become fairly non-competitive. [*Beaver Deposition*, p. 35].

29. The results of the 1986 pension survey increased PECO's activity with regard to evaluation of alternatives to improve the pension plan. [*Beaver Deposition*, p. 59].

30. Over a period of years prior to 1987, there was a growing interest in adjusting the pension plan formula, to improve the benefit. [*Everett Deposition*, p. 21].

31. In 1985, at the request of PECO's Finance Division, TPF&C performed an analysis for a long-term financial plan-

ning study, which included a projection of what PECO's pension obligations would be in the future. [*Fleischer Deposition*, pp. 181-182].

32. On March 14, 1985, TPF&C forwarded a copy of the preliminary report of the PECO Service Annuity Plan Funding Study to Neil Lucera in the Financial Division. (Exhibit TPF&C-45]

33. On October 2, 1985, the final version of the TPF&C pension funding study for the Service Annuity Plan was presented to PECO. [*Fleischer Deposition*, pp. 190-191; Exhibit TPF&C-43].

34. On May 1, 1986, Thomas Payne of PECO prepared a memorandum regarding the bi-annual pension survey to be conducted by PECO beginning in November, 1986. [Bates Document No. 103].

35. As of June, 1986, Mr. Crommie informed management of the continuing deterioration of the pension plan and stated that changes might be considered to alleviate that situation. [*Crommie Deposition*, pp. 267-269].

36. On June 23, 1986, Crommie sent a memorandum to Downs entitled 1987 Pension Survey. Downs sent back a handwritten response to a question raised by Crommie. [Bates Document Nos. 178-179].

37. On August 11, 1986, PECO adopted a policy for the "Efficient and Economic Work Force Distribution" as set forth in the memorandum from Charles L Fritz dated August 11, 1986. [Exhibit Beaver-2].

38. In accordance with PECO's policy for "Efficient and Economic Work Force Distribution," it has been PECO's long-standing corporate policy to avoid layoffs wherever possible. One of the steps to be taken to avoid layoffs according to the PECO policy is "an early retirement offer, or a selective termination allowance [which] will be considered and, if practicable, implemented." [Exhibit Beaver-2].

39. In 1987, Mr. Everett was aware that PECO, was "rather low in minimum pension benefits compared to the other companies that [PECO] looked to for comparability." [*Everett Deposition*, pp. 19-20].

40. The Personnel and Industrial Relations Department was responsible for analyzing PECO's benefit programs and recommending improvements, with the assistance of outside consultants. [*Austin Deposition,* p. 29].

41. In 1986 and 1987, Fritz, as the Chairman of the Service Annuity Board, had the responsibility to recommend any changes to the Service Annuity Plan to Everett and Austin. [*Fritz Deposition* pp. 30-31]

42. In 1987, John McGinley and Ronald Downs participated in evaluating the proposals for changes to the pension plan. [*Fritz Deposition* p. 73].

43. The consulting firm of Towers, Perrin, Forster & Crosby (TPF&C) is the Service Annuity Plan actuary, and has been so for at least 20 years.

44. One of the services TPF&C has provided to PECO is pricing alternative pension plan improvements. [*Fleischer Deposition,* pp. 193, 248; *Fritz Deposition,* pp. 62-63].

45. The Independent Group Association (IGA) is an employee organization consisting solely of PECO employees. The IGA is not a bargaining unit. Any employee who is not a supervisor can become a member of the IGA after six months of service. [*Fritz Deposition,* pp. 140-141].

46. Plaintiff Donald Kurz was a member of the IGA. [*Kurz Deposition,* p. 33].

47. Plaintiff Donald Kurz was aware that, historically, August 1 was the date that wages and benefits were increased. [*Kurz Deposition,* p. 31].

48. In 1986, the IGA proposed an increase to the pension benefit as part of the August 1, 1986 wage and benefit package. That recommendation was not adopted. [*Fritz Depostion* p. 47].

49. In 1987, pension benefits continued to be a concern the IGA raised with management. [*Fritz Deposition.* pp. 56, 84-85].

50. On February 27, 1987, Beaver had a telephone conversation with Fleischer at TPF&C with respect to questions concerning a possible pension plan change. [*Fleischer Depostion,* p. 196; Exhibit TPF&C-49].

51. Fritz was aware that in February, 1987, TPF&C was working with PECO to evaluate a formula to change the pension plan. [*Fritz Deposition*, pp. 187-188; Exhibit Fritz-1].

52. On March 3, 1987, TPF&C was evaluating eight alternative proposals for a change to the pension plan for PECO, including one that had been recommended by the IGA. [*Fritz Deposition*, pp. 188-189; Exhibit Fritz-2].

53. A March 3, 1987 document contains pricing worksheets prepared by Fleischer for eight different proposed plan improvements under different proposals (including the IGA proposal) for PECO. [*Fleischer Deposition*, pp. 204-209; Exhibit TPF&C-50].

54. On the Wednesday following March 3, 1987, Fleischer held a meeting at PECO to discuss the alternative plan improvement formulas to be considered.

55. On March 5, 1987, Fritz had a preliminary meeting with the IGA Executive Committee to discuss the August 1, 1987 wage and benefit package. At this meeting, proposals for an increase in pension benefits were discussed. [Bates Document No. 199; *Fritz Deposition*, p. 130). Fritz remarked generally that the timing was right to make a significant change to the pension plan and that they had been looking at different ways of making a change to the pension, including the proposal given by the IGA in 1986. [Bates Document No. 199; *Fritz Deposition*, pp. 127-129].

56. On March 30, 1987, Fleischer and Beaver had meeting regarding a pension plan proposal. Frederick Beaver recorded notes of the meeting on that date. [Bates Document No. 176].

57. On March 30, 1987, Fleischer requested Pat Kniceley of TPF&C to make calculations showing the impact of Section 415 of the IRS [sic] on the pension benefits that would be paid to Mr. Everett and Mr. Austin by the Service Annuity Plan and Supplemental Pension Plan under various proposals for an improvement to the pension plan. [*Fleischer Deposition*, pp. 211-212; Exhibit TPF&C-52).

58. On March 31, 1987, Fleischer had a conversation with Fritz concerning a proposed improvement to the pension. [Exhibit Austin-12.]

59. On April 2, 1987, Fleischer sent to Beaver rough cost estimates of four alternative changes to the Service Annuity Plan. [Exhibit Fritz-6].

60. On April 13, 1987 and April 20, 1987, Fleischer sent letters to Crommie outlining calculations as identified in 57, above. [Exhibits TPF&C 56 and 58].

61. During April and May of 1987, TPF&C continued to "cost out" alternative pension plan formulas, applying several different interest rate assumptions. Changes in the interest rate assumption impacted on the cost to PECO, of any proposed plan.

62. On April 14, 1987, Fleischer sent a memorandum to Fritz attaching a draft memorandum for Fritz to consider sending to Mort Rimmerman discussing actuarial assumptions in light of the proposed changes to the Service Annuity Plan. [Exhibit Fritz-8].

63. Most of the design work on development of alternative formulas was done internally at PECO. [*Murdoch Deposition*, p. 74].

64. On April 15, 1987, J.M. Lange, the President of the Independent Group Association, sent to Fritz a memorandum regarding the August 1, 1987 wage package, which included, among other requests, the IGA's specific proposals for an increase to the percentage calculation for pension benefits. [Bates Document Nos. 210-212; *Fritz Deposition*, P. 137].

65. Fritz met again with the IGA on April 24, 1987, at which time there were further discussions about proposed changes to the pension plan. (Bates Document Nos. 216, 239; *Fritz Deposition*, pp. 142-144].

66. On May 5, 1987, Beaver submitted under Crommie's signature a memorandum to R.N. Downs, the Director of Employee Services regarding the proposed pension plan improvement. (Bates Document No. 073; *Beaver Deposition*, pp. 74-75].

67. By May 5, 1987, Beaver knew that the work he was doing was aimed at an amendment to the pension plan to be effective August 1, 1987, if a change was to take place. [*Beaver Deposition*, p. 73).

68. As of May 5, 1987, Crommie had the charge from management to maintain confidentiality on information that was passed involving potential changes to the pension plan. [*Crommie Deposition*, pp. 249-250].

69. On May 13, 1987, TPF&C calculated the estimated 1987 pension expense for possible plan changes. [Exhibit TPF&C-65A].

70. On May 14, 1987, Fleischer sent Crommie a letter outlining the impact on PECO's annual pension expense should any of the possible changes be made to the Service Annuity Plan. [Exhibit TPF&C-66].

71. A discussion outline prepared by TPF&C dated May 20, 1987 contained proposed benefits improvements under seven alternative formulas. (Exhibit Austin-6; TPF&C-69]. TPF&C met with PECO to discuss these alternatives. [*Murdoch Deposition*, pp. 62-63].

72. On May 22, 1987, Murdoch sent to Fritz a letter summarizing TPF&Cs comments, recommendations and conclusions for improved pension benefits provided under PECO's Service Annuity Plan; six alternative proposals still were being considered. [TPF&C-69D; *Fritz Deposition*, p. 121].

73. On May 22, 1987, the 1986 Pension Survey Report prepared by the Employees Services Division of the PECO Personnel and Industrial Relations Department stated that:

> Based on the information presented in this report, the time for a pension change, as discussed in the meeting of October 2, 1985, has arrived. Working with our consultants, TPF&C, we have examined a number of options, some of which are included in this report, and it is our recommendation that proposal No. 4 be adopted. TPF&C has estimated the annual cost of this improvement to be approximately $9 million.
>
> Normally, changes in the pension formula are announced in July and are effective the following January 1, but the Electric Production Department has recommended an effective date of August 1, 1987 if any change is made and we concur." [Bates Document Nos. 064-071 with quote appearing on Bates Document No. 069].

74. Fritz was receiving cost figures for proposed changes to the wage and benefits package, including the pension plan, before May 22, 1987. [*Fritz Deposition*, pp. 100-101].

75. On May 28, 1987, Fritz sent a memo to Austin and Everett, setting forth the cost of one specific proposal, and requested their approval to proceed further. [Bates Document Nos. 89-90].

76. After receiving the approval from Everett and Austin to proceed, Fritz recommended to the Board of Directors to increase the pension benefits. [*Fritz Deposition*, p. 68].

77. As of June 3, 1987, TPF&C was still costing out alternatives. (TPF&C)

78. Personnel and Industrial Relations prepared a document, entitled "Pension Improvement," "Vacation Improvement," and "Back-Shift Premium Improvement" dated June 16, 1987, for a presentation of the proposed package to the Board of Directors. [Bates Document Nos. 203-209; *Fritz Deposition*, p. 135].

79. Austin and Everett made a recommendation to the Board of Directors, based on the proposal presented by Fritz. Proposed changes were submitted to Everett and Austin about one month to six weeks prior to the Board of Directors meeting. [*Everett Deposition*, p. 18].

80. Fritz was the person who formally went to the Board of Directors to request the change to the pension plan. [*Fritz Deposition*, p. 67].

81. On June 22, 1987, the PECO Board of Directors voted to approve the increase in the pension formula for all participants in the Service Annuity Plan.

82. Until PECO's Board of Directors approved an increase in pension benefits, there was no decision by PECO to amend the pension plan and, therefore, all studies were kept confidential. [*Austin Deposition*, p. 42, *Beaver Deposition*, p. 78].

83. PECO had a policy in 1986 and 1987 not to discuss any proposed plans to amend the pension plan with employees until decision were made by the Board of Directors. [*Everett Deposition*, p. 29; *Austin Deposition*, p. 41].

84. PECO considered that it would be bad management to tell employees about possible changes, because those changes could be modified or ultimately might not be adopted at all. It would have been contrary to company policy to advise employees that a plan, modification or improvement was under consideration. [*Everett Deposition*, p. 30].

85. Once the Board of Directors voted to amend the pension plan, PECO took measures to notify its employees.

86. Immediately following the Board of Directors' vote on June 22, 1987, those employees who were scheduled to retire July 1, 1987, were contacted and given an opportunity to change their election in order to take advantage of the increased benefits. [*Fritz Deposition*, pp. 86-87, 110-112].

87. On July 2, 1987, PECO announced the increase in the pension formula in an official bulletin.

88. On August 1, 1987, the increase in the pension formula became effective. The improvement provides approximately 17.6% increase in the pension for those employees that had 40 years of service and retired at the age of 65. [*Fritz Deposition*, p. 148].

89. Part A of the pension calculation was increased from 1% to 1.2%. Part B of the calculation was increased from .3% to .35%. [*Fritz Deposition*, p. 41].

90. In 1986 and 1987, the steps a PECO employee would undergo in order to retire included the following: notifying his employing officer that he wished to retire; the employing officer would then write a letter to the Vice President notifying him of the employee's desire to retire and the date of retirement; the Vice President would send a letter to the Benefits Division advising of the employee's desire to retire and the date and request that the process be started; the Benefits Division would pull the employee's service record, run a pension calculation for him, contact the employee to schedule a retirement interview; a retirement package would be assembled and a one-on-one interview with the employee and his spouse would be held. [*McCartney Deposition*, 7/17/91, pp. 27-28].

91. The retirement interview was generally scheduled to take place approximately three months before the PECO

employee ended his active service with the company; that is, many employees would end active service with the company and take their last period of vacation immediately before their final retirement date. [*McCartney Deposition*, 7/17/91, pp. 31-32].

92. The purpose of the retirement interview was to provide the PECO employee with the information relative to his retirement benefits including pension amount and options for life insurance. [*McCartney Deposition*, 7/17/91, p. 28].

93. A PECO employee who has applied for retirement remains an employee of the company until his actual retirement date, even if he is on vacation and has ended active service with the company. [*McCartney Deposition*, 7/17/91, p. 32].

94. In 1986 and 1987, a PECO employee had the right to revoke his intention to retire at any time prior to his retirement date. [*McCartney Deposition*, 7/17/91, p. 34].

95. According to Crommie, "it was a normal course of events for employees to raise" questions about a possible change to the pension plan with representatives of the Employee Services Division. [*Crommie Deposition*, pp. 204-205].

96. McCartney first became aware that PECO was planning a change to the pension plan which ultimately resulted in the change effective August 1, 1987 when it was officially announced. [*McCartney Deposition*, 12/11/91, pp. 7-9].

97. When asked by an employee about to retire if there were any upcoming changes to the pension plan, McCartney would state that he did not know; he was unaware of any changes coming into effect prior to the official announcement. [*McCartney Deposition*, p. 25].

98. In 1986 and 1987, McCartney was not a member of the IGA. [*McCartney Deposition*, 12/11/91, p. 13].

99. McCartney was unaware that Mr. Fritz was talking to the IGA about changing the pension plan in 1986 or 1987 time period. [*McCartney Deposition*, 12/11/91, p. 21].

100. In the later part of 1986 through the early part of 1987 Fritz had heard that a few questions were being asked by retiring employees concerning the possibilities of any change to the pension plan. [*Fritz Deposition*, pp. 77-78].

101. When answering retiring employees' questions about changes in the pension plan, members of the Benefits Division were instructed to give employees the facts known as of that time, and were instructed not to speculate. [*Fritz Deposition*, p. 77].

102. In the 1986-1987 time frame, Wagner conducted about twenty retirement interviews. [*Wagner Deposition*, p. 15].

103. Wagner did not know of the change to the pension plan effective August 1, 1987 until it was announced throughout the company on or about the 4th of July, 1987. [*Wagner Deposition*, pp. 37-38].

104. Crommie told Wagner that if he was asked questions by employees considering retirement about potential plan changes, that he was to tell them only about the plan as it [was] right now and not to speculate. [*Wagner Deposition*, pp. 23-24]. Prior to the official announcement, Wagner had no knowledge that any changes in the pension plan were being contemplated. [*Wagner Deposition*, pp. 23-24].

105. During 1986-1987, Lobb conducted interviews on an "as needed" basis. [*Lobb Deposition*, p. 48]. She conducted roughly one interview per month. [*Lobb Deposition*, p. 48].

106. According to Lobb, it was not uncommon for someone to ask if there was going to be an improvement to the pension plan or a sweetener at retirement seminars that PECO held in 1986 and 1987. [*Lobb Deposition*, p. 57].

107. The Benefits Division routinely receives telephone calls from employees asking whether or not there is any information about potential changes to the pension plan. [*Lobb Deposition*, pp. 27-28].

108. Mrs. Lobb was told by Mr. Crommie to respond very honestly and say "I don't know" to questions she would receive from employees as to whether or not there were any potential changes to the pension plan. [*Lobb Deposition*, p. 28].

109. Lobb did not know of any potential plan changes until she saw the July 2, 1987 official bulletin. [*Lobb Deposition*, p. 43].

110. The following factors influenced PECO's decision to change the Pension Plan effective August 1, 1987: the IGA had proposed increasing pension benefits in both 1986 and 1987; the pension plan was well funded in 1987; and, compared to other companies in the industry, PECO's pension benefits were low. [*Fritz Deposition*, pp. 66-67].

STANDARD FOR SUMMARY JUDGEMENT

Under Federal Rule of Civil Procedure 56(c), summary judgment may be granted when, "after considering the record evidence in the light most favorable to the non-moving party, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Turner v. Schering-Plough Corp.*, 901 F.2d 335, 340-41 (3d Cir. 1990). For a dispute to be "genuine," the evidence must be such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Williams v. Borough of Chester*, 891 F.2d, 458, 460 (3d Cir. 1989). To establish a genuine issue of material fact, the non-moving party must introduce evidence beyond the mere pleadings to create an issue of material fact on "an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). The burden of demonstrating the absence of genuine issues of material fact is initially on the moving party regardless of which party would have the burden of persuasion at trial. *First Nat'l Bank of Pennsylvania v. Lincoln Nat'l Life Ins.*, 824 F.2d 177, 180 (3d Cir. 1987). Following such a showing, the non-moving party must present evidence through affidavits or depositions and admissions on file which comprise of a showing sufficient to establish the existence of every element essential to that party's case. *Celotex*, 477 U.S. at 323. If that evidence is, however, " 'merely colorable' or is 'not significantly probative,' summary judgment may be granted." *Equimark Commercial Finance Co. v. C.I.T. Financial Corp.* 812 F.2d 141, 144 (3d Cir. 1987) (quoting, in part, *Anderson*, 477 U.S. at 249-50).

DISCUSSION OF ERISA CLAIMS

Breach of fiduciary duties.

Plaintiffs in Fischer and Kurz contend that the defendants violated fiduciary duties under ERISA, 29 U.S.C. § 1104, when they allegedly misrepresented to members of the plaintiff classes that PECO had no current intention to modify its pension benefits, shortly before such modifications were implemented. Plaintiffs contend that fiduciary duties attached to the defendants, as plan administrators, to inform them that a change to the pension plan was in the offing, *before* PECO's decision to amend its pension plan to provide for a sweetened early retirement was finalized. They contend that the PECO defendants' failure to advise them of the coming changes constituted material misrepresentations of their future rights under the plan. They further allege that senior management's instructions to staff level human resources employees, to answer retiring employees inquiries by responding that they were unaware of any pending changes to the pension plan, also constituted material misrepresentations.

PECO, in response, contends that it had no affirmative duty to inform retirees of proposed changes to the pension plan, prior to a formal corporate decision to implement the changes. More specifically, it avers that ERISA does not require that an employer, when acting in the capacity of a corporate decision maker, inform employees of preliminary plans or discussions concerning a change in pension benefits, until such time as a decision to alter the plan has been finalized.

29 U.S.C § 1104 states in part:

> (1) Subject to section 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;

> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

It has been held that when an employer acts in the capacity of a corporate decision maker, no fiduciary duties attach. *See Trenton v. Scott Paper Co.*, 832 F.2d 806 (3d Cir. 1987), *cert. denied* 485 U.S. 1022 (1988). Where employers wear two hats, as employers and plan administrators, fiduciary status is only assumed when and to the extent that they function in their capacity as plan administrators. *Payonk v. HMW Industries Inc.*, 883 F.2d 221, 225 (3d Cir. 1989), *quoting, Amato v. Western Union Intern. Inc.*, 773 F.2d 1402, 1416. 17 (2d Cir. 1985).

Nothing in the statutory language of ERISA indicates there is a duty to disclose information on benefits plans before they take effect. *See Payonk* 883 F.2d at 221; *Trexel v. E.I. DuPont De Nemours & Co.*, No. 85-759 (D.Del. Sept. 9, 1987), aff'd mem., 845 F.2d 1016 (3d Cir. 1988). Courts in other circuits have also held that a duty to disclose information on benefits before they take effect does not exist. *See Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 435 (4th Cir. 1986); *Fine v. Steele*, 699 F.2d 1091, 1094 (11th Cir. 1983); *Fenton Industries v. National Shopmen Pension Fund*, 674 F.2d 1300, 1306 (9th Cir. 1982).

Plaintiffs acknowledge that the defendants' decisions to amend the respective pension plans were business decisions to which ERISA fiduciary duties did not attach. However, they aver that the PECO defendants' failure to accurately answer prospective retirees' inquiries regarding changes to the plan, after they were under serious consideration, constituted misrepresentation. The plaintiff classes rely for support of their legal theory in these matters on the case of *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154 (6th Cir. 1988). The court in *Berlin* held that when a plan administrator or a plan fiduciary makes a material misrepresentation after serious consider-

ation has been given to offering a plan, that action may constitute a breach of fiduciary duty. *Id.* at 1163.

In *Berlin*, the plaintiff alleged that he officially notified his employer he was going to retire on June 7, 1982, which would have enabled him to recover benefits under the employer's about to be announced special severance plan. The company urged Berlin to change his retirement date to March 31, 1982, allegedly for administrative accounting convenience. This change placed Berlin one day outside the plan's window. *Id.* The district court, focusing solely upon whether the employer was acting as a fiduciary when it undertook to change the plan's benefits, determined that the employer was under no duty to inform the employee of the sweetened plan because the decision to change the plan was a business decision, and not a fiduciary decision.

The Court of Appeals reversed. Rather than focusing upon the character of the decision to change the plan, the Court found that the proper inquiry was whether the employer's actions materially mislead those to whom the duties of loyalty and prudence described in 29 U.S.C. § 1104 are owed. *Berlin*, 858 F.2d at 1163. The *Berlin* court defined material misrepresentations to be misleading communications to plan participants regarding plan administration (for example, the employee's eligibility under a plan, or the extent of his benefits under a plan). *Id.* Applying *Berlin* to the facts sub judice, the plaintiffs urge that we too find that the PECO's failure to notify future retirees of the pending changes to the plan, which they contend were under serious consideration, also constituted material misrepresentations violative of § 1104.

PECO, to the contrary, argues that the decision in these matters is controlled by our own Court of Appeal's decision in *Payonk*, supra. In *Payonk*, the plaintiffs withdrew from a defined benefits pension plan shortly before its termination and, therefore, did not share in the distribution of the surplus of the plan. The plaintiffs in *Payonk* contended that the defendants breached their fiduciary duties by failing to disclose information about the upcoming plan termination. *Payonk*, 883 F.2d at 225. The district court held that the termination of the pension plan was made by the defendants in their business

capacity; that the defendant had no duty to notify the plaintiffs of the plan termination until the termination date was fixed; and, that the defendants had no duty to disclose preliminary information leading up to the termination of the plan. *Id.* at 224.

The Court of Appeals affirmed. The court compared the facts alleged by Payonk to *Berlin* and found that its defendants made no *Berlin* type misrepresentations to the plaintiffs before the final decision to terminate the plan had been made. The court held that as long as the defendants complied with the notice requirements mandated by ERISA, "an employer's lawful termination decision, absent affirmative misrepresentations designed to mislead plan participants, is not governed by ERISA's standard of fiduciary duties." *Id.* at 229.

We agree with PECO that *Payonk* controls the outcome of these cases. In *Berlin* the company, knowing that an amended plan was forthcoming, intentionally told its employees that no definite plans existed for a special pension plan offering, when indeed such a plan had been implemented once and the decision to implement it again had been completed. The company advised the employees, to their detriment, not to delay their retirement plans. The affirmative misrepresentations of the defendants in *Berlin* were used for the purpose of misleading employees who were delaying their retirements in anticipation of a better severance benefit plan. *Berlin* 858 F.2d at 1160.

To the contrary, on the record presented we find there is no evidence of affirmative material misrepresentations made by any fiduciary or non-fiduciary employee of PECO. As regards Fischer, the stipulated facts reveal that when asked by an employee about the possibility of an early retirement plan in December of 1989, PECO's CEO Paquette replied that if the company needed to reduce the number of employees, it was possible that they might do it through an early retirement program. (Fischer Joint Stip. ¶ 21.) The plaintiffs contend that this constituted a material misrepresentation because Paquette had been involved in PECO's ongoing discussions over staffing levels, total wages and other costs; that by December 1989,

there was no question but that Paquette was considering an early retirement program to reduce costs.

The Fischer plaintiffs also focus upon the information being disseminated by the retirement counselors, who were told to respond to retiree's questions about potential changes to the plan honestly and say, "I don't know". (Fischer Joint Stip ¶ 102.) The retirement counselors supplied information with regard to the status of the current pension plan and were told to inform the employees about exactly what the plan called for at that time. (Fischer Joint Stip. ¶ 104.) Further, the retirement counselors stated that they were not aware of any upcoming changes. (Fischer Joint Stip. ¶ 104.) Plaintiffs make a two-fold argument that these statements were affirmative misrepresentations: they contend that the counselors engaged in improper conduct; they also contend that senior management engaged in improper conduct in directing the counselors to disseminate the allegedly misleading information.

The decision to recommend that the Board of Directors of PECO approve an early retirement offer was officially made on April 19, 1990. (Fischer Joint Stip. ¶ 45.) The amendments to the Service Annuity Plan were approved by the Board of Directors on May 25, 1990. (Fischer Joint Stip. ¶ 90.) We find that under *Berlin* and *Payonk*, PECO was under no duty to advise its pending retirees of possible changes to the pension plan prior to April 19, 1990, so long as it made no affirmative material misrepresentations regarding its intentions to alter the plan. This is the key date in the Fischer controversy because before April 19, 1990 PECO's management had made no final decision to implement a change to the pension plan. We find that Paquette's statement in December 1989, that an early retirement program might be implemented, was not, as a matter of law, an affirmative misrepresentation because at the time of his statement no corporate change in policy had been finalized. Indeed, Paquette's statement that an early retirement program might be implemented, accurately represented the current state of affairs at PECO, as portrayed in the stipulated facts.

We also find that the statements of the retirement counselors were not affirmative misrepresentations, necessary for

establishing a breach of fiduciary duties under *Berlin*. The Fischer plaintiffs retired from January 1, 1990 to April 1, 1990, before an official recommendation was made to the Board of Directors that an early retirement plan be approved. At the times of the plaintiffs' retirement interviews, defendants had no duty to inform the plaintiffs of potential changes to the plan because the plan amendment decision was not finalized. Further, it has been stipulated that at the time the counselors informed the class members that they did not know of any decisions to alter the pension plan that the counselors were telling the truth. Because PECO did not have an affirmative duty to inform the plaintiffs of potential unfinalized changes in the plan and because the counselors made no affirmative misrepresentations to the plaintiff class members, we find that PECO is entitled to judgment as a matter of law on this issue.[1]

As regards Kurz, the plaintiff class argues that PECO made affirmative misrepresentations, while the plan changes were under serious consideration, by keeping confidential all information regarding the possible changes until the revised plan was approved by the Board of Directors. They recite the stipulation's provisions that PECO participated in surveys that compared their employee pension benefits to other companies in the utilities industry from at least as early as 1977, (Kurz Joint Stip ¶ 20), and devoted significant effort to revising the plan beginning in June 1986, as evidence that changes were under serious consideration when the class members made their retirement decisions.

However, the stipulation also recites that the formal proposal to change the pension plan was presented to the PECO Board on June 16, 1987 (Kurz Joint Stip. ¶ 76); that the PECO Board of Directors voted to approve an increase in the pension formula requested by the Vice President of Personnel and Industrial Relations of PECO on June 22, 1987. (Kurz Joint Stip. ¶ 81). Before that time, discussions regarding potential

---

1. The class also separately contends that PECO senior management engaged in improper conduct in directing the counselors to disseminate allegedly misleading information. We find this argument is untenable in light of the parties' stipulation that the information disseminated by the counselors was truthful at the relevant time.

changes to the plan were kept confidential because of a company policy not to discuss any proposed changes to the pension plan with employees until the Board of Directors had made a decision. (Kurz Joint Stip. ¶ 83.) PECO considered it bad management to tell employees about possible changes because the changes could be modified or not adopted at all. (Kurz Joint Stip. ¶ 84)

We find that PECO's policy of keeping potential changes to their pension plan confidential does not constitute an affirmative misrepresentation. We also find that the changes were not "under serious consideration" until they were presented to the corporation's Board, which had the final authority to implement the change. As in Fischer, we find that under *Berlin* and *Payonk*, absent affirmative misrepresentations after the plan had been proposed to the Board, PECO had no affirmative duty to inform the plaintiffs of potential, unfinalized changes in their pension plan. The plaintiffs have failed to produce any evidence that the defendants made affirmative misrepresentations during the relevant time period. Accordingly, we find as a matter of law that PECO's policy of keeping plan changes strictly confidential did not violate the defendants' fiduciary duties under 29 U.S.C. § 1104.

Estoppel

Both plaintiffs' classes also contend that the defendants are liable on the basis of estoppel from denying them increased benefits under the plan. The federal common law claim of estoppel may be applied when an employee relies, to his detriment, on an interpretation of an ambiguous provision in a plan by a representative of that plan. *Kane v. Aetna Life Insurance*, 893 F.2d 1283, 1285 (11th Cir. 1990). To recover under a theory of common-law equitable estoppel, the plaintiffs must show that (1) the party to be estopped misrepresented material facts, (2) the party to be estopped was aware of the true facts, (3) the party to be estopped intended that the misrepresentation be acted on or had reason to believe the statement would be relied on, (4) the party asserting the estoppel did not know, or could not have known the true facts, and (5) the party asserting the estoppel reasonably relied on

the misrepresentation. *National Companies Health Insurance Plan v. St. Joseph's Hospital*, 929 F.2d 1558, 1572 (11th Cir. 1991); *see generally Heckler v. Community Health Services, Inc.*, 467 U.S. 51, 59 (1984).

Given our resolution of the plaintiffs' misrepresentation claims, we also find the plaintiffs can show no factual basis for recovery on their estoppel claims. As we stated, there is no evidence that the defendants made any material misrepresentations to the members of either of the plaintiff classes. The first element needed to maintain an estoppel claim is a material misrepresentation made by the party to be estopped. Accordingly we find that the plaintiffs can not proceed under a common law estoppel theory.

Discrimination

The plaintiff classes also contend that the defendants engaged in discriminatory conduct in violation of § 510 of ERISA, 29 U.S.C. § 1140. Section 510 states in part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . .

Congress had a specific type of problem in mind when it enacted § 510:

> [This provision was] added by the Committee in the face of evidence that in some plans a worker's pension rights or the expectation of those rights were interfered with by the use of economic sanctions or violent reprisals. Although the instances of these occurrences are relatively small in number, the Committee has concluded that safeguards are required to preclude this type of abuse from being carried out and in order to completely secure the rights and expectations brought into being by this landmark reform legislation.

S.Rep.No. 93-127, 93d Cong., 2d Sess. The prohibitions in § 510 were aimed primarily at preventing unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights. *West v. Butler* 621 F.2d 240, 245 (6th Cir. 1980). To pose the threat Congress sought to address when it enacted § 510, an employer's actions must affect the employees' working conditions or procure the employees' dismissal in order to interfere with the employees' attainment of their vested pension rights. *Id.* at 246. "The legislative intent of ERISA was not to ensure the sanctity of early retirement expectations, but to safeguard accrued retirement benefits." *Payonk.* 883 F.2d at 229, *citing Bencivenga v. Eastern Pa. Teamsters,* 763 F.2d 574 (3d Cir. 1985).

A violation of § 510 can arise, for example, from an employer's failure to recall or rehire employees if the selection of employees for recall is made to interfere with the attainment of rights under a plan. *See Balten v. Van Ess,* 474 F.Supp. 1324 (E.D.Wis. 1976). Discrimination under § 510 can also occur when an employer arbitrarily discharges an employee whose work rights are about to vest, or when an employer makes the workplace unpleasant enough to amount to a constructive discharge. *West* 621 F.2d at 245; *see Greenblat v. Budd Co.* 666 F.Supp. 735 (E.D.Pa. 1987) (employee stated cause of action when facts showed that a superior systematically harassed worker who was forced to take inferior benefits). Section 510 can likewise apply to a suspension, expulsion, disciplinary action, or any other form of discrimination for the purpose of interfering with pension rights, which affects the employment relationship "in some substantial way." *West,* 621 F.2d at 246.

Section 510 is modeled upon Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3); "discrimination" thereunder means adverse treatment of an employee amounting to a "constructive discharge." *Young v. Standard Oil,* 660 F.Supp 587 (S.D.Ind. 1987), aff'd. 849 F.2d 1039 (7th Cir. 1988). Section 510 can apply to a plan amendment where the employer had "discriminatorily modified" the plan, to intentionally benefit, or injure, certain identified

employees or a certain group of employees. *Aronson v. Servus Rubber Division*, 730 F.2d 12, 17 (1st Cir. 1984), *cert. denied*, 469 U.S. 1017 (1984). A plan amendment will not violate § 510 if it has a readily apparent business justification based on independently established lines. *Id.* at 16.

As in the context of employment discrimination claims under Title VII, employees alleging discrimination under ERISA bear the burden of making out a prima facie case of discrimination. *Gavalik v. Continental Can Co.*, 812 F.2d 834, 853 (3d Cir. 1987), citing *McDonnel Douglas Corp. v. Green*, 411 U.S., 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed. 668 (1973) and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253-54, 101 S.Ct. 1089, 1093-94, 67 L.Ed. 2d 207 (1981) (refining *McDonnel Douglas*). "To establish a prima facie case under ERISA [29 U.S.C. § 1140], an employee must demonstrate (1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee may become entitled." *Gavalik*, 812 F.2d at 853. 'The essential element of proof under § 510 is specific intent to engage in proscribed activity." *Id. See, e.g., Turner v. Schering-Plough Corp.*, 901 F.2d 335 (3d Cir. 1990)(employee failed to present sufficient evidence that pension interference might have been the motivating factor in his discharge, and therefore did not make out a prima facie case for discrimination).

We find that the plaintiff classes have failed to establish a prima facie case of discrimination under Section 510. As we have found, in neither of these cases did the defendants make affirmative misrepresentations, so as to interfere with the attainment of the plaintiffs' rights under their plans. There is no dispute that the plaintiffs' retirements under the plans were voluntarily and that they are currently receiving pension benefits from the plans. The members of the plaintiff classes were no longer employees of PECO when the subject plan amendments took effect and therefore had no rights under the revised plans. Further, there is no contention that PECO either discharged the plaintiffs or disrupted their employment relationships, so as to constitute a constructive discharge.

The record also discloses that the defendants' decisions to amend the plans had apparent business justifications and were not implemented in order to interfere with the plaintiffs' attainment of their rights. The decision to amend the plan in Fischer was in response to the Public Utility Commission's denial in part of PECO's rate request. (Fischer Joint Stip. ¶ 45.) PECO's goal was to reduce costs by decreasing its work force. The factors that influenced PECO's decision to change the pension plan in Kurz were: that the IGA had proposed increasing pension benefits in both 1986 and 1987; the pension plan was well funded in 1987; and, compared to other companies in the industry, PECO's pension benefits were below average. (Kurz Joint Stip. ¶ 110.)

Plaintiffs in Fischer make the additional allegation that PECO engaged in discriminatory conduct by providing some employees with privileged information regarding the early retirement plan. However, we find the Fischer plaintiffs have failed to show that PECO acted with the "specific intent" to interfere with the attainment of their rights under ERISA or their retirement plan.

The record demonstrates that PECO informed its employees on April 19, 1990 that it was going to recommend that the Board approve an early retirement program to included employees who were due to retire on or after May 1, 1990. The plaintiffs' class includes those employees of PECO who retired between January 1 and April 1, 1990. They contend that PECO's decision to inform those who were to retire on or after May 1, 1990 that the early retirement plan was going to be recommended to the Board, constituted discrimination against the class because the changes to the plan were under serious consideration beginning in December 1989.

However, the defendants had no duty, as a matter or law, to inform the plaintiffs of the proposed early retirement plan until it was recommended to the Board on April 19, 1990. Under ERISA's statutory provisions, PECO was only required to provide notice to its current employees of any "material modification" of the plan "not later than 210 days after the end of the plan year in which the change is adopted to each participant. . ." 29 U.S.C. §§ 1022(a)(1), 1024(b)(1). PECO

informed their employees of the upcoming plan three and one half weeks before the plan went into effect. There is nothing in the record to demonstrate that PECO chose the April 19, 1990 date with the specific intent to discriminatorily modify the plan to intentionally benefit or injure certain identified employees or a certain group of employees. Rather, the record reflects that the notice was given on that date, after the course of events which led PECO's senior management to recommend the change reached it natural conclusion. Accordingly, we must conclude that the plaintiffs have failed to demonstrate a prima facia case of discrimination under § 1140.[2]

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2. The plaintiffs have also asserted that a Mr. William Curry was given privileged information in February, 1991 regarding the improved pension plan announced on April 19, 1991. Mr. Curry testified in a deposition on November 19, 1991 that the first time he heard about the early retirement package was when he called Michael Crommie after July 6, 1990. (Def.'s Resp., Exhibit H at 29.) In an affidavit Curry executed on April 16, 1992, however, he avers that he was told by a PECO retirement counselor on or about February 21, 1990 to be patient and wait to retire because "something good is coming later".

Viewing these facts in the light most favorable to the Fischer class, i.e. assuming that Curry had knowledge of the modification before April 19, 1990, we find that the plaintiffs have not shown that PECO acted with the specific intent to discriminatorily modify the plan to intentionally benefit Curry or injure the other members of the class. Absent the use of trickery or some form of improper inducement to the plaintiff class to persuade them to retire, while others received inside information to persuade them to remain, we cannot conclude that the mere fact that one counselor made unauthorized statements to a retiree rises to the level of intentional discrimination against the class or constitute action designed to discharge or harass employees in order to keep them from obtaining vested pension rights.

CONCLUSION

In conclusion, on the record presented the plaintiff classes have failed to support their claims under ERISA. The plaintiffs have failed to demonstrated that the PECO defendants breached any fiduciary duties to disclose information concerning the amended pension plan before it was under serious consideration by the PECO board of directors. Further, we find that PECO did not engage in discriminatory conduct under ERISA. Accordingly, the motions of the PECO defendants pursuant to Fed. R. Civ. P. 56 will be granted.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HERBERT L. FISCHER, et al.	:	
	:	
v.	:	C.A. NO. 90-8020
	:	
PHILADELPHIA ELECTRIC CO., et al.	:	
	:	
DONALD R. KURZ, et al.	:	
	:	
v.	:	C.A. NO. 91-2771
	:	
PHILADELPHIA ELECTRIC CO., et al.	:	

ORDER

The motion of defendants Philadelphia Electric Company, Joseph F. Paquette, Jr., Michael J. Crommie and the Service Annuity Plan of PECO for summary judgment pursuant to Fed. R. Civ. P. 56 in Civil Action Number 90-8020 is GRANTED.

The motion of plaintiffs Herbert L Fischer, et al on their own behalf and as representatives of the class consisting of all those former employees of Philadelphia Electric Company who retired on January, February, March or April 1, 1990, who would have reached age 50 by December 31, 1990 and who would have completed five or more credited years of service, for summary judgment pursuant to Fed. R. Civ. P. 56 in Civil Action Number 90-8020 is DENIED.

Judgment on the merits is ENTERED in favor of defendants Philadelphia Electric Company, Joseph F. Paquette, Jr., Michael J. Crommie and the Service Annuity Plan of PECO and against plaintiffs Herbert L. Fischer, et al on their own behalf and as representatives of the class consisting of all those former employees of Philadelphia Electric Company who retired on January, February, March or April 1, 1990, who would have reached age 50 by December 31, 1990 and who would have completed five or more credited years of service.

The motion of defendants Philadelphia Electric Company, the Service Annuity Plan of PECO, Charles L. Fritz, J.L. Everett, III, and John H. Austin, Jr. for summary judgment pursuant to Fed. R. Civ. P. 56 in Civil Action Number 91-2771 is GRANTED.

The motion of plaintiffs Donald R. Kurz, et al on their own behalf and as representatives of the class consisting of all those former employees of PECO who retired from the company from January 1987 through and including June 1, 1987 for summary judgment pursuant to Fed. R. Civ. P. 56 in Civil Action Number 91-2771 is DENIED.

Judgment on the merits is entered in favor of defendants Philadelphia Electric Company, the Service Annuity Plan of PECO, Charles L. Fritz, J.L. Everett, III, and John H. Austin, Jr. and against plaintiffs Donald R. Kurz, et al on their own behalf and as representatives of the class consisting of all those former employees of PECO who retired from the company from January 1987 through and including June 1, 1987.

IT IS SO ORDERED.

Charles R Weiner

CHARLES R. WEINER

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1685

DONALD R. KURZ, WILLIAM W. ANDERSON; JAMES W. BECK; WILLIAM T. BERGEN; CHARLES W. BOWDEN; WILLIAM H. BROWN; RICHARD CAHILL; ARMANDO L. CAPOFERRI; ROBERT C. DEMARCO; JAMES J. DILOLLE, SR.; VINCENT J. DIMAGGIO; JOHN J. DIVALENTINO, JR.; WILLIAM E. DRUMEL; VICTOR J. GIBIALANTE; FRANCIS T. GOLDEN; JAMES J. GRANGER; ELMER D. GREIM, JR.; JAMES H. HAIR; JOHN M. HOOPES; BENJAMIN J. KILIAN; GEORGE C. LINTHICUM; HUBERT A. MCKOWN, JR.; HENRY P. MCNAMEE; OLIVER K. MESSNER; ROBERT E. MILLER; JOHN A. MORSE; SAMUEL J. MULLEN; JOHN A. MUNLEY; STANLEY B. MYERS; JOHN J. NUSSPICKEL; JAMES W. PATTERSON; ALFRED B. SCHUMANN; JOSEPH C. SHARKEY; WILLIAM H. SMOYER; WOODROW E. SNYDER; JAMES D. SUTLIFF; EDWARD J. VETNER; DOMINIC C. VIGLIANESE; G. EARLE WATT; FREDERICK W. WINTERLING; JOHN R. YOUNG,

Appellants,

v.

THE PHILADELPHIA ELECTRIC COMPANY; SERVICE ANNUITY PLAN OF PHILADELPHIA ELECTRIC COMPANY; CHARLES L. FRITZ, J.L. EVERETT, III; JOHN H. AUSTIN, JR.

Appellees.

Present: BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, and FEINBERG,* *Circuit Judges.*

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*Senior Circuit Judge Feinberg voted only as to panel rehearing.

SUR PETITION FOR REHEARING

The petition for rehearing filed by appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judges Stapleton, Hutchinson and Roth would grant rehearing.

BY THE COURT,

Carol Los Mansmann

Circuit Judge

JULY 20, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1795 and 95-1796

DONALD R. KURZ; WILLIAM ANDERSON; JAMES E.W. BECK; WILLIAM T. BERGEN; CHARLES W. BOWDEN; WILLIAM H. BROWN; RICHARD CAHILL; ARMANDO L. CAPOFERRI; ROBERT C. DEMARCO; JAMES J. DILOLLE, SR.; VINCENT J. DIMAGGIO; JOHN J. DIVALENTINO, JR.; WILLIAM E. DRUMEL; VICTOR J. GIBIALANTE; FRANCIS T. GOLDEN; JAMES J. GRANGER; ELMER D. GREIM, JR.; JAMES H. HAIR; JOHN M. HOOPES; BENJAMIN J. KILIAN; GEORGE C. LINTHICUM; HUBERT A. MCKOWN, JR.; HENRY P. MCNAMEE; OLIVER K. MESSNER; ROBERT E. MILLER; JOHN A. MORSE; SAMUEL J. MULLEN; JOHN A. MUNLEY; STANLEY B. MYERS; JOHN J. NUSSPICKEL; JAMES W. PATTERSON; ALFRED B. SCHUMANN; JOSEPH C. SHARKEY; WILLIAM H. SMOYER; WOODROW E. SNYDER; JAMES D. SUTLIFF; EDWARD J. VETNER; DOMINIC C. VIGLIANESE; G. EARLE WATT; FREDERICK W. WINTERLING; JOHN R. YOUNG

v.

PHILADELPHIA ELECTRIC COMPANY; SERVICE ANNUITY PLAN OF PHILADELPHIA ELECTRIC COMPANY; CHARLES L. FRITZ; J.L. EVERETT, III; JOHN H. AUSTIN, JR.

JOHN J. DIVALENTINO, JR., WILLIAM E. DRUMEL; JOHN A. MORSE; SAMUEL J. MULLEN; STANLEY B. MYERS; DOMINIC C. VIGLIANESE; JAMES J. DILOLLE; BENJAMIN J. KILIAN; CHARLES W. BOWDEN; ELMER D. GREIM, JR.; FREDERICK W. WINTERLING; JAMES W. BECK; JAMES H. HAIR; ROBERT C. DEMARCO; ALFRED G. SCHUMANN; RICHARD CAHILL; JAMES W. PATTERSON; JOHN M. HOOPES; HUBERT A. MCKOWN, JR.; ROBERT E. MILLER; JAMES D. SUTLIFF; HENRY P. MCNAMEE;

FRANCIS T. GOLDEN; WILLIAM T. BERGEN; GEORGE C. LINTHICUM; WILLIAM W. ANDERSON; JOHN R. YOUNG; VINCENT J. DIMAGGIO; SHIELDS L. DALTROFF; RICHARD O. FOLKMAN; ALFRED E. STAVOLA; ROBERT H.C. LESS; SAMUEL E. BELL; DONALD F. WASHINGTON; FRANK J. GALLAGHER; MAURICE M. PEITZMAN; HARRY G. TURNER, JR.; ROBERT I. FRIEND; DONALD C. ROBINSON; WILLIAM J. LEAMAN, JR.; AUGUSTUS W. O'MALLEY; DALLAS S. SCOTT, JR.; JOHN S. STILLWAGON; ROBERT C. HECKESSER; WILLIAM R. TRAVETTI; WILLIAM B. HORLOCK; JAMES STATES; THOMAS W. RAYER; JOHN H. VONRHINE; WALTER ALLWOERDEN; GEORGE C. WIEDERSUM, JR.; JAMES R. MCCARRON; SALVATOR J. DESTEFANO; JOHN C. GARVIN; A. WILLIAM LANCASTER; JOSEPH A. FOCHT; ROBERT MITCHELL; JOSEPH P. SUBRANNI; JOHN F. CRAWFORD; WILLIAM G. TAYLOR; KENNETH R. SEDGLEY, JR., IRWIN G. BLACKBURN; CHARLES R. CAREY; JOHN R. YOUNG; JESSEE E. GRAY, JR.; JAMES D. DERSTINE; ALLEN H. BRAID; PAUL L. THOMAS; STEPHEN MICKLOSH, JR.; WILLIAM L. GIBBONS; RUSSELL B. MURRAY; ROLAND J. MARKUN; ERNEST W. BEAM; RAYMOND W. SCHOLL, JR.; JOHN F. PARKER; JOSEPH F. MCBRIDE; VINCENT S. BOYER; MARTIN M. MORGAN and DAVID MONZO,

Appellants in 95-1795

DONALD R. KURZ; WILLIAM ANDERSON; JAMES E.W. BECK; WILLIAM T. BERGEN; CHARLES W. BOWDEN; WILLIAM H. BROWN; RICHARD CAHILL; ARMANDO L. CAPOFERRI; ROBERT C. DEMARCO; JAMES J. DILOLLE, SR.; VINCENT J. DIMAGGIO; JOHN J. DIVALENTINO, JR.; WILLIAM E. DRUMEL; VICTOR J. GIBIALANTE; FRANCIS T. GOLDEN; JAMES J. GRANGER; ELMER D. GREIM, JR.; JAMES H. HAIR; JOHN M. HOOPES; BENJAMIN J. KILIAN; GEORGE C. LINTHICUM; HUBERT A. MCKOWN, JR.; HENRY P. MCNAMEE; OLIVER K. MESSNER;

ROBERT E. MILLER; JOHN A. MORSE; SAMUEL J. MULLEN; JOHN A. MUNLEY; STANLEY B. MYERS; JOHN J. NUSSPICKEL; JAMES W. PATTERSON; ALFRED B. SCHUMANN; JOSEPH C. SHARKEY; WILLIAM H. SMOYER; WOODROW E. SNYDER; JAMES D. SUTLIFF; EDWARD J. VETNER; DOMINIC C. VIGLIANESE; G. EARLE WATT; FREDERICK W. WINTERLING; JOHN R. YOUNG

v.

PHILADELPHIA ELECTRIC COMPANY; SERVICE ANNUITY PLAN OF PHILADELPHIA ELECTRIC COMPANY; CHARLES L. FRITZ; J.L. EVERETT, III; JOHN H. AUSTIN, JR.

Peco Energy Company, formerly Known as Philadelphia Electric Company, Service Annuity Plan of Philadelphia Electric Company, Charles L. Fritz, J.L. Everett, III and John H. Austin, Jr.

Appellants in 95-1796.

SUR PETITION FOR PANEL REHEARING

Before: COWEN and ROTH, *Circuit Judges* and CINDRICH,[1] *District Judge*

SUR PETITION FOR PANEL REHEARING

The petition for panel rehearing filed by appellants Monzo, Morgan and McEntee in the above-entitled case having been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

By the Court,

Circuit Judge

Dated: MAY 7, 1977

1. Honorable Robert J. Cindrich, United States District Court Judge for the Western District of Pennsylvania, sitting by designation.

§1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

§1113. Limitation of actions

No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of —

(1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation; or

(2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;

except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

§1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought —

* * *

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

* * *

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

Supreme Court, U.S.
FILED
SEP 4 1997
CLERK

No. 97-214

In The

Supreme Court of the United States

October Term, 1996

DONALD R. KURZ, *et al.*,

Petitioners,

v.

PHILADELPHIA ELECTRIC COMPANY, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

DAVID H. MARION*
HOWARD J. BASHMAN
MONTGOMERY, MCCRACKEN, WALKER & RHOADS, LLP
123 South Broad Street
Philadelphia, PA 19109
(215) 772-1500

**Counsel of Record for Respondents*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

PARTIES TO THE PROCEEDING

Respondents in this matter are PECO Energy Company, formerly known as Philadelphia Electric Company, Service Annuity Plan of Philadelphia Electric Company, Charles L. Fritz, J.L. Everett, III and John H. Austin, Jr.

Respondents have no parent companies or non-wholly owned subsidiaries to list pursuant to Rule 29.6.

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BRIEF IN OPPOSITION

Respondents PECO Energy Company, *et al.*, (collectively, "PECO") respectfully pray that the petition for writ of certiorari sought in this matter be denied.

STATEMENT OF THE CASE

This is the second of two consolidated cases filed in the United States District Court for the Eastern District of Pennsylvania alleging that PECO was liable under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001, *et seq.*, for affirmatively misleading employees concerning whether PECO was contemplating changes to certain of its ERISA plans.

In this case, employees who decided to retire before PECO changed its pension plan to provide more lucrative benefits claimed that PECO violated ERISA when it failed to inform them that such changes were being contemplated. In the earlier of the two cases, known as the *Fischer* case, employees who decided to retire before PECO offered certain early retirement incentives claimed that PECO violated ERISA when it failed to inform them that such incentives were being contemplated. *See Fischer* v. *Philadelphia Elec. Co.*, 96 F.3d 1533 (CA3 1996), *cert. denied*, 117 S. Ct. 1247 (1997).

Petitioners correctly note at the outset of their Petition for Writ of Certiorari, *see* Pet. for Cert. at 1 n.1, that the first question presented for review here is identical to the question that this Court refused to review earlier this year when the Court denied certiorari in *Fischer*, 117 S.

Ct. 1247 (1997). In this case, review should again be denied.

The Third Circuit's Decision Rests on Alternate Grounds

The Third Circuit's decision in this matter rests on alternate grounds, the second of which is unworthy of review and presents an adequate and independent basis for the Third Circuit's ruling in PECO's favor.

As the first basis for its ruling, the Third Circuit held that ERISA imposed no duty on a company to inform an employee concerning whether changes could occur to the company's ERISA plans until the changes were the subject of "serious consideration." App. to Pet. for Cert. 11a. Because some plaintiffs retired after the date on which the Third Circuit held that possible pension plan changes began to receive "serious consideration," the court of appeals proceeded to determine whether ERISA's statute of limitations barred the class members' claims. *Id.*

As the alternate ground for its holding, the Third Circuit ruled that because "all the material elements of a breach of fiduciary duty claim were patently obvious on July 2, 1987, the day PECO announced the pension increase," App. to Pet. for Cert. 13a, and "[b]ecause no fraud or concealment of any kind occurred," *id.* at 15a n.5, ERISA's three-year statute of limitations applied to the claims of the plaintiff class, *id.* at 15a. Since this action was not filed until April 30, 1991, more than three years after the ERISA claims of the plaintiff class accrued, the Third Circuit held as an alternate basis for its judgment in PECO's favor that the claims of the plaintiff class were

time-barred. The Third Circuit's ruling on the statute of limitations issue constitutes an adequate and independent basis for the Third Circuit's judgment in PECO's favor on the ERISA claims of the plaintiff class.

Even if this Court were now willing to review the issue as to which it recently denied certiorari in *Fischer*, the Third Circuit's decision that the claims of the plaintiff class were time-barred is plainly not deserving of this Court's review. Accordingly, this Court should deny the Petition for Writ of Certiorari.

Factual and Procedural Background

PECO, since 1977, has conducted regular periodic reviews of its pension fund programs. Part of that review involves comparing the benefits that PECO offers its employees to the benefits that other similar companies offer their employees. The event that gives rise to this suit was PECO's announcement on July 2, 1987 of a plan to provide more lucrative pension benefits to its employees as of August 1, 1987.

The plaintiff class consists of various former PECO employees who retired between February 1, 1987 and July 1, 1987. The plaintiff class alleged that ERISA imposed a duty on PECO to inform plaintiffs before July 2, 1987 that pension plan changes might occur. The plaintiff class further alleged that if PECO had provided such information, the class members would have postponed retirement until after the pension plan changes took effect.

The district court concluded that PECO began seriously considering an increase in pension benefits as of

March 1, 1987. Accordingly, the district court entered judgment in favor of all members of the plaintiff class who asked about pension benefits after March 1, 1987. App. to Pet. for Cert. 7a. The district court also concluded that it was appropriate to apply ERISA's alternative six-year statute of limitations, because, in the district court's view, "[t]he class action complaint clearly sounds in concealment." App. to Pet. for Cert. 65a-66a (conclusions of law 22-25).

PECO thereafter appealed to the United States Court of Appeals for the Third Circuit. The Third Circuit reversed both aspects of the district court's decision. First, the court of appeals ruled, based on its review of the evidence of record, that PECO did not begin to give serious consideration to the pension plan changes that are the subject of this suit until May 28, 1987. App. to Pet. for Cert. 7a-11a. As previously noted, however, the plaintiff class included PECO employees who had retired between February 1, 1987 and July 1, 1987. The claims of some plaintiffs therefore survived the Third Circuit's ruling on the issue of serious consideration.

The Third Circuit turned next to examine the question whether the ERISA claims of the plaintiff class were time-barred. The Third Circuit ruled that the plaintiff class's claims under ERISA accrued on July 2, 1987: "In the current case, all the material elements of a breach of fiduciary duty claim were patently obvious on July 2, 1987, the day PECO announced the pension increase." App. to Pet. for Cert. 13a. That date was more than three and one-half years prior to the filing of this lawsuit.

Examining the facts of record, the Third Circuit concluded, notwithstanding that plaintiffs had claimed concealment, that it could "find nothing suggesting that fraud or concealment delayed the discovery of the breach of fiduciary duty claim." App. to Pet. for Cert. 15a. Indeed, the court of appeals determined, based on its review of the record, that "no fraud or concealment of any kind occurred." App. to Pet. for Cert. 15 n.5.

Accordingly, the Third Circuit ruled that ERISA's three-year statute of limitations, which applies where a plaintiff has actual knowledge of his or her claim, and not ERISA's six-year statute of limitations, governed the claims of the plaintiff class. App. to Pet. for Cert. 15a. Given that (1) a three-year statute of limitations governed the claims of the plaintiff class, (2) the plaintiff class knew of its ERISA claims as of July 2, 1987, and (3) the plaintiff class did not initiate this suit until April 30, 1991, the Third Circuit ruled that all plaintiffs' claims were time-barred. App. to Pet. for Cert. 11a-15a.[1]

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[1] The Third Circuit's precise holding on the statute of limitations issue was: "We therefore hold that §413's statute of limitations bars the fiduciary duty claims of those members of the plaintiff class who asked about a change in pension benefits and retired after May 28, 1987 [the date on which serious consideration was found to have commenced] but before July 2, 1987." App. to Pet. for Cert. 15a. Nevertheless, it is plain that the Third Circuit's statute of limitations ruling constitutes an alternate ground for the dismissal of plaintiffs' entire suit. Moreover, the Third Circuit's conclusion that "no fraud or concealment of any kind occurred," App. to Pet. for Cert. 15 n.5, was not limited to those class members who retired between May 28, 1987 and July 1, 1987. Rather, that conclusion plainly applied to all members of the plaintiff class.

The Third Circuit issued its rulings in this case and in the *Fischer* case on October 1, 1996. In the *Fischer* case, plaintiffs filed a Petition for Writ of Certiorari on December 24, 1996 presenting a single question for review, which was identical to the first question presented for review in this case. On March 17, 1997, this Court denied the Petition for Writ of Certiorari filed in the *Fischer* case. *See* 117 S. Ct. 1247 (1997).

In the instant case, plaintiffs filed a petition for panel rehearing asserting that the panel misapprehended facts pertaining to three individual class members. On May 7, 1997, the Third Circuit denied the petition for panel rehearing. App. to Pet. for Cert. 144a-46a.[2] Thereafter, plaintiffs filed the Petition for Writ of Certiorari that is the subject of this Brief in Opposition.

ARGUMENT

This Court Should Deny Certiorari Because The Second Ground On Which The Third Circuit's Judgment Rests Is An Adequate And Independent Ground On Which To Sustain The Judgment And Is Clearly Unworthy Of Review

I. This is an inappropriate case in which to resolve any conflict created by the Second Circuit's recent decision in *Ballone*

The Third Circuit's ruling in PECO's favor rests on alternate grounds. The second ground, holding the ERISA

[2] As reproduced in the Appendix to the Petition for Writ of Certiorari, the order denying the petition for panel rehearing bears the erroneous date of May 7, 1977. *See* App. to Pet. for Cert. 146a.

claims of the plaintiff class to be time-barred, constitutes an adequate and independent basis for the court of appeals' ruling. The court of appeals' decision on the statute of limitations question is plainly undeserving of this Court's review. Accordingly, while the first question presented arguably now is the subject of a circuit conflict, this is not the appropriate case in which to resolve the conflict, because no matter how the conflict is resolved the judgment in PECO's favor would stand.

On March 21, 1997, four days after this Court denied the Petition for Writ of Certiorari filed in the *Fischer* case, the United States Court of Appeals for the Second Circuit issued its decision in *Ballone* v. *Eastman Kodak Co.*, 109 F.3d 117. In *Ballone*, the Second Circuit held that an employer could be held liable for making affirmative misrepresentations concerning whether pension plan changes were under review even before such changes were the subject of "serious consideration." *Id.* at 122-25.

In so holding, the Second Circuit appears to have disagreed with the rulings of other courts of appeals that have refused to impose ERISA liability on an employer in similar circumstances until after pension plan changes become the subject of "serious consideration." *See, e.g.*, *Fischer* v. *Philadelphia Elec. Co.*, 96 F.3d 1533, 1539 (CA3 1996), *cert. denied*, 117 S. Ct. 1247 (1997); *Berlin* v. *Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163-64 (CA6 1988); *Wilson* v. *Southwestern Bell Tel. Co.*, 55 F.3d 399, 405 (CA8 1995); *Maez* v. *Mountain States Tel. & Tel., Inc.*, 54 F.3d 1488, 1500-01 (CA10 1995); *Barnes* v. *Lacy*, 927 F.2d 539, 544 (CA11), *cert. denied*, 502 U.S. 938 (1991).

Even if this Court were disposed to resolve without further percolation among the courts of appeals the apparent conflict created by the Second Circuit's recent ruling in *Ballone*, this case is not the appropriate vehicle.

No matter how this Court might resolve the apparent conflict between *Ballone* and the Third Circuit's ruling in this case, the judgment against plaintiffs would stand because of the Third Circuit's separate ruling on the statute of limitations question. Given this Court's practice of resolving circuit conflicts only in cases where resolution of the conflict could affect the result of the case, this Court should deny the Petition for Writ of Certiorari. The Court could of course later grant review in a case in which resolution of the conflict that *Ballone* appears to create could benefit the party seeking review, and after other circuits have had an opportunity to consider the Second Circuit's recent ruling.[3]

II. There is no reason for this Court to review the Third Circuit's statute of limitations ruling

Petitioners make a half-hearted attempt to argue that the Third Circuit's resolution of the statute of limitations

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[3] Except for noting the existence of the Second Circuit's ruling in *Ballone*, the Petition essentially repeats the very same arguments for granting review of the first question presented that this Court rejected in *Fischer*. Because PECO fully addressed those arguments in its Brief in Opposition filed in *Fischer*, No. 96-1038, and because this Court denied review in *Fischer* on March 17 of this year, PECO has limited its argument herein on the first question presented to whether this Court should grant review in light of *Ballone*.

question is worthy of this Court's review, but petitioners' effort in that regard is unpersuasive.

Dedicating just a little more than a page of their Petition to this issue, *see* Pet. for Cert. 25-26, petitioners begin by asserting that "the Third Circuit's decision regarding the applicable statute of limitations conflicts with decisions of other courts of appeals." *Id.* at 25. The discussion that follows, however, recognizes that the Third Circuit's statute of limitations ruling is in accord with the rulings of five circuits and is allegedly contrary only to the decision of a *single* court of appeals – and even that asserted conflict disappears upon analysis of the latter decision.

The Petition erroneously asserts that the Third Circuit's statute of limitations holding conflicts with the Second Circuit's ruling in *Diduck* v. *Kaszycki & Sons Contractors, Inc.*, 874 F.2d 912 (1989), that "[f]or a breach of fiduciary duty involving fraud or concealment, the three-year exception for actual knowledge does not apply, and a party has six years from the time it discovers the breach to bring an action." Pet. for Cert. 26 (quoting *Diduck*, 874 F.2d at 919).

The holding of *Diduck* on which petitioners rely could only give rise to a circuit conflict if the present case had been found to have "involv[ed] fraud or concealment . . . ," *id.*, but the Third Circuit had nevertheless applied the shorter limitations period. However, the Third Circuit expressly found in the context of its statute of limitations discussion that "no fraud or concealment of any kind occurred" in this case. App. to Pet. for Cert. 15a n.5. There is, accordingly, no conflict between the Third

Circuit's holding in this case, in which no fraud or concealment occurred, and the Second Circuit's holding in *Diduck*, where the plaintiffs produced sufficient evidence of fraud and concealment.

Because the Third Circuit's ruling on the statute of limitations issue – holding the ERISA claims of the plaintiff class to be time-barred under ERISA's three-year statute of limitations – constitutes an adequate and independent ground for the Third Circuit's ruling, and because the Third Circuit's ruling on the statute of limitations issue is not deserving of this Court's review, the Petition for Writ of Certiorari should be denied.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DAVID H. MARION*
HOWARD J. BASHMAN
MONTGOMERY, MCCRACKEN,
WALKER & RHOADS, LLP
123 South Broad Street
Philadelphia, PA 19109
(215) 772-1500

**Counsel of Record*
for Respondents